IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. **77-405**

GEORGE H. LUSTIG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, GEORGE H. LUSTIG, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 15, 1977. Petition for Rehearing En Banc denied August 12, 1977.

I. OPINION BELOW.

The opinion of the Ninth Circuit, in *U.S. v. Lustig, et. at.*, Slip Opinion No. 1260, No. 76-2661, _____ F.2d _____, (June 15, 1977). Rehearing En Banc denied August 12, 1977, is not yet reported; a copy is attached as Appendix A. No District Court opinion was reported; any written memorandum decisions are reproduced as Appendix B.

II. JURISDICTION.

The opinion in the Court of Appeals was entered June 15, 1977. A timely Petition for Rehearing and Suggestion of the Appropriateness of Rehearing En Banc, filed June 30, 1977, was denied August 12, 1977. Jurisdiction is invoked under 28 U.S.C. 1254 (1). The instant Petition is timely under Supreme Court Rule 22 (2), since filed within thirty days after entry of final judgment.

III. QUESTIONS PRESENTED FOR REVIEW.

A. Whether the Denial of the Protection of the Common Law Marital Privilege and the Federal Marital Privilege Under Rule 501 as to Mr. Lustig's Common Law Wife Violated His United States and Alaska Constitutional Rights to Due Process, Equal Protection, and Privacy?

B. Whether Instructing the Jury that "Very Little Evidence is Necessary to Show that a Particular Defendant was a Part" of a Conspiracy Violated the Right to Proff Beyond Reasonable Doubt as to Each Element of an Offense as Mandated by the Due Process Clause of the Fifth Amendment?

C. Whether the Freezing of All of the Defendant's Assets and the Denial of a Severence or Reasonable Continuance to Enable Petitioner's Counsel of Choice to Investigate, Prepare, and Subpoena Witnesses Denied the Sixth Amendment Rights to Counsel, Cross-Examination, Confrontation, and to Call Witnesses?

D. Whether the Warrantless Search of an Opaque Parcel

Seized From Mr. Lustig's Vehicle Absent Probable Cause or the Necessity for an Inventory Search, Violated the Rights to Privacy and Freedom From Illegal Search and Seizure Under the United States and Alaska Constitutions, *United States v. Chadwick*, 97 S.Ct. 2476, 45 L.W. 4798, (6/21/77) and *South Dakota v. Opperman*, 428 U.S. 364 (1976), Where the Search Occurred at Police Headquarters?

E. Whether the Refusal to Allow Cross-Examination as to Motive for Bias and the Denial of a Two Hour Continuance to Enable the Petitioner to Confront and Cross-Examine the Source of Damaging Hearsay Statements and to Produce Evidence of Bias, Violated the Sixth Amendment Rights to Confrontation and to Call Witnesses?

F. Whether the Refusal to Allow an Individual Poll as to Each Count of a Multiple Count Indictment Where the Petitioner had Admitted All the Elements of One Count, Violated the Constitutional Right to a Jury Trial?

G. Whether the Arbitrary Refusal of the Right to be Present, or a Record, at a Communication by the Trial Judge with a Juror, and the Excusal of Said Juror, Violated the Right to be Present, the Right to Due Process, and the Right to a Jury Trial?

IV. CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED.

This case involves the due process clause of the Fifth Amendment, the equal protection clause of the Fourteenth Amendment, the warrant clause and unreasonable search and seizure clause of the Fourth Amendment, the right to counsel, confrontation, and witness clause of the Sixth Amendment, and the right to privacy from the First, Fourth, and Ninth Amendments to the U.S. Constitution. Rule 501, 603, 605 of the Federal Rules of Evidence, and Rules 26, 31, and 43 of the Federal

Rules of Criminal Procedure are involved, as well as Article 1, §14 and §22 of the Alaska Constitution, 18 U.S.C. 3164 (Speedy Trial Act), 21 U.S.C. 846 (conspiracy), AS 25.05.011, 25.05.261, 25.05.311 (Alaskan common-law marriage), and 13 A.A.C. §2.375 and 2.350 (Alaskan impound law). The pertinent text of each is set forth in Appendix C.

V. STATEMENT OF THE CASE.

The Petitioner, George H. Lustig, is serving fourteen years pursuant to jury convictions for distribution of a controlled substance (cocaine), in violation of 21 USC §841(a), and conspiracy to distribute a controlled substance (cocaine), in violation of 21 USC §846.[1]

Mr. Lustig was charged in a superseding indictment on March 24, 1976, with co-defendants Gregory D. Pederson and Cheryl Rae Pederson.[2]

1. Mr. Lustig received 9 years incarceration for the instant convictions, and five years incarceration, to be served consecutively, in a probation revocation proceeding in *U.S. v. Lustig*, No. A 115-73 Cr., (U.S. Dist. Ct., AKA.) (September 15, 1976), based on the conviction and alleged conduct in the instant proceeding. The revocation and sentence were appealed to the Ninth Circuit, and affirmed in *U.S. v. Lustig*, slip. Op. No. 1277, No. 76-3146, _____ F.2d _____ (June 15, 1977). Petition for Rehearing En Banc denied August 12, 1977. A Petition for a Writ of Certiorari with regard to said opinion is being filed simultaneously with the instant Petition, and the Court is respectfully requested to take judicial notice of said Petition and the record below.

2. The co-defendant Gregory D. Pederson, filed a Petition for A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, on the 18th day of July, 1977, with regard to *U.S. v. Pederson*, slip. Op. No. 1260, _____ F.2d _____ (9th Cir. 6/15/77) with regard to the instruction that very little evidence is necessary to show that a particular defendant was a part of a conspiracy. Said Petition, Case No. 77-5118, is still pending before this Court. The appeal of Cheryl Rae Pederson, in *U.S. v. Cheryl Rae Pederson*, No. 76-2725 is still pending in the Ninth Circuit with regard to the questioned instruction and other points.

After posting bail in the instant proceeding, Mr. Lustig was rearrested on a Petition to Revoke Probation and held without bail, in a substandard pretrial detention facility, severely hampering his efforts to obtain counsel. All of his assets were frozen by an injunction issued against transferring or encumbering said assets.

Despite the difficulties engendered by the frozen assets and the conditions of incarceration, Mr. Lustig, after substantial effort, obtained counsel of choice four days before trial. The trial judge, mistakenly believing that he was bound by a rigid reading of the Speedy Trial Act, 18 USC §3164, denied repeated motions for continuance, or severance, and the Ninth Circuit Court of Appeals denied an Application for Writ of Prohibition.[3]

Mr. Lustig's original counsel, after entering a limited appearance for purposes of arraignment, moved to withdraw due to non-availability of his partner, whom Mr. Lustig initially expected to retain, and due to a conflict with Mr. Lustig. The record is replete with references to the difficulty Mr. Lustig encountered obtaining counsel of choice, and the conflict existing between Mr. Lustig and his initial attorney.

The evidence against the Petitioner was largely circumstantial. At his arrest, the police seized a brown paper bag containing a scale and a "seal-a-meal" machine tied by scientific evidence to the bags of cocaine sold by the co-defendant Pederson to an undercover officer. The "seal-a-meal" machine was discovered in a search of the opaque brown paper bag at

3. Entitled *George H. Lustig v. The Honorable James Von Der Heydt*, filed 4/26/76 (9th Cir. No. 76-1919). (Denied, 4/26/76). An Appeal from Order Respecting Conditions of Release, in A 115-73 Cr. was filed in the Ninth Circuit on 4/26/76 and denied after the trial as being moot. (R. A 115-73 Cr. at 323-369).

police headquarters, after said bag was seized from Mr. Lustig's truck, despite the fact he had friends standing by to move the vehicle, as is his right under the applicable Alaska Statutes governing the State Troopers making the arrest.

The most damaging testimony was given by his common law wife, Callie Newton Lustig, who had lived with him in a common-law marriage for seven years and bore him two children. She testified over objection, she had personally used the "seal-a-meal" machine to bag cocaine, and sold cocaine at George's direction, "taking care of business" while he was hospitalized. The District Court, and the Ninth Circuit, both incorrectly held Rule 501, of the Federal Rules of Evidence, is governed by State law and both incorrectly held that in Alaska, AS 25.05.011, 25.05.261, and 25.05.311, totally prohibit common law marriage.

The District Court denied a hearing on whether the Lustig/Newton common law relationship had been terminated with no chance of reconciliation, and the Court of Appeals made a *de novo* finding an irreconcilable termination had occurred, to defeat the equal protection aspects of the "anti-marital facts" privilege.[4]

Both the District Court and the Court of Appeals incorrectly held that no confidential communications had been revealed.

The primary reason for Callie Newton Lustig's testimony and bias, was a lesbian relationship existing between herself and Phyllis Resnek, a police informant. The court restricted cross-

4. Both the District Court and the Court of Appeals were aware Callie Newton Lustig had served Mr. Lustig with a "common-law divorce" complaint asking for custody of the children and one half of his property only a few days prior to trial, that no final decree has yet been entered in said action, and that negotiations with regard to reconciliation were, and are still, ongoing between Mr. Newton Lustig and Mr. Lustig.

examination of Callie as to bias, and refused a two hour continuance to enable the defense to subpoena Phyllis Resnek to establish said bias, and further to confront and cross-examine the source of 27 phone calls made by Ms. Resnek to the police to the effect that Mr. Lustig was a "big fish" in dealing drugs.[5]

The trial court refused confrontation of the informant Tarnef, who had purportedly identified Mr. Lustig as being at the scene of one of the sales, and had linked his name to the conspiracy, as to whether he was currently under investigation or charges, with respect to the felony murder of a local policeman, arson, perjury, or narcotics.

On the second day of testimony, the trial judge informed counsel in chambers that he had met ex parte with one of the jurors, and had decided to excuse him. Despite repeated demands for an evidentiary hearing, and the right to be present at any further questioning of the juror, the Judge further examined the juror in chambers without a record, and excused him in the absence of Mr. Lustig or counsel.[6] No exigent circumstances existed.

The jury was instructed, over objection, that:

> "Once a conspiracy is shown to exist, very little evidence is necessary to show that a particular defendant was a part of it. Slight evidence is enough.... (Certified Record 537).

5. Callie Newton Lustig was induced to testify by "relay" of information from Lee Peterson, a former United States Attorney to Phyllis Resnek, to Callie, to the effect that Mr. Lustig purportedly "implicated" Callie in his defense. Note that in fact Tarnef, another government informant, implicated Callie.

6. While the opinion incorrectly indicates that the alternate juror seated was approved by the defendant, in fact, said alternate was not so approved. Peremptory challenges as to the alternates were exhausted, and the defense reserved one peremptory challenge as to the main trial jury to avoid seating the juror, Mrs. Scott, who was the alternate eventually seated over objection.

Although Mr. Lustig admitted Count V (possession) of the multiple count indictment, an individual poll as to each juror as to each count was denied.

By court order, Mr. Lustig has been prohibited from contacting the juror interrogated ex parte by the Judge, or contacting the other jurors as to whether said juror communicated any alleged bias.

The civil suit filed by Mr. Lustig's common-law wife asking for a "common-law divorce" remains pending. Mr. Lustig's assets remain frozen. Mr. Lustig remains incarcerated.

This Petition for Writ of Certiorari Follows.

VI. REASONS FOR GRANTING THE WRIT OF CERTIORARI

A. The Common Law Marital Privilege and Equal Protection, Due Process, and the Right to Privacy.

The opinion holds: (1) Under Rule 501 of the Federal Rules of Evidence the "anti-marital facts" privilege is controlled by state law and Alaska state law totally prohibits common-law marriage; (2) The common-law marriage had been "terminated with no chance of reconciliation"; (3) None of the testimony of the defendant's common-law wife reveal confidential communications. *U.S. v. Lustig*, supra, at 1271-1273.

At Footnote 11, the opinion concedes the existence of a common-law marriage in accordance with common-law principles.

1. The Newton/Lustig Marriage has not Been Terminated.

The Newton/Lustig Complaint was filed two days prior to the

trial, they had separated five months prior to his arrest, after seven years of marriage. They have two children. (Tr. 1963-1965).

Mr. Lustig repeatedly demanded that a showing be made outside the presence of the jury as to termination. (Tr. 1926, 1927, 1932, 1933). The Court was aware negotiations for reconciliation were still in progress.[7]

After refusing a hearing, the trial Judge failed to make findings as to termination of the marriage, and the Ninth Circuit made said findings *de novo* on appeal, unsupported by the record below.[8]

2. Callie Newton Lustig Violated Confidential Communications.

As reflected by the record, she claimed she was merely "taking care of business" for George while he was in the hospital. (Tr. 1955, 1967), she had left due to discussions over drug dealing (Tr. 1957, 1966), she was selling drugs to Mr. Lustig's

7. "...there also has to be a showing that the marriage is disintegrating. *There still has to be a showing.* Bring the lady in here and let us hear her testimony. *There are still negotiations going on between myself and Mr. Peterson in terms of trying for a reconciliation...and we are not at the state where there is complete disintegration of marriage. It is not totally disintegrated. The government is contributing to that* to bring this lady in and put her on the stand." (Tr. 1932) (E.A.)

8. No final decree has been granted by the State Court in the suit for dissolution of the marriage, assets, and child custody by Callie Newton Lustig; negotiations as to reconciliation are still ongoing and in pre-trial stages. For the other cases dealing with the termination of a marriage prior to trial by divorce, see *Cooper v. U.S.*, 282 F.2d 527 (9th Cir. 1966), *Brodskey v. U.S.*, 339 F.2d 180, 182 (9th Cir. 1964), *U.S. v. Crockett*, 534 F.2d 589, 604 (5th Cir. 1976), *U.S. v. Burks*, 470 F.2d 482 (D.C. Cir. 1972) (termination by death), *Volinitias v. Immigration and Naturalization Service*, 352 F.2d 766, 768 (9th Cir. 1965), *U.S. v. Ashby*, 245 F.2d 684, 686 (5th Cir. 1957), *Hoss v. Purinton*, 229 F.2d 104 (9th Cir. 1955), *Yoder v. U.S.*, 80 F.2d 695 (10th Cir. 1935).

customers due to communications by Mr. Lustig while he was in the hospital (severely burned and under heavy medication) as to hospital bills he was incurring. (Tr. 1950, 1961, 1969, 1970, 1971, 1994, 1996, 1997, 2004, 2014), prior to her leaving him. (Tr. 1965).

3. The Court of Appeals has Decided the Important State Question of the Protection Afforded Common-Law Marriage Under the Constitutional Rights to Equal Protection and Privacy in Conflict with Applicable Alaskan Law.

The opinion makes a broad holding that common-law marriage is invalid under Alaskan law, citing AS 25.05.011, 25.05.261, and 25.05.311.

In fact, these are essentially "property statutes", limited by the Alaska Supreme Court, on an equal protection analysis. In *Burgess Const. Co. v. Lindley*, 504 P.2d 1023 (AK 1972), the court indicated a distinction between a legal spouse and a common-law spouse via the workmen's compensation statute, AS 23.30.215, would violate Article 1, Section 1, of the Alaska Constitution [equal protection].[9] Justice Erwin, concurring, stated:

> "*I find the statutory grant of workmen's compensation benefits to a legal wife and not to a common-law wife, is a violation of Article 1, § 1, of the Alaska Constitution which guarantees all persons equal protection under the law.* Such classification constitutes impermissible discrimination that would deny benefits under AS 23.30.215 (a) (2) [Workmen's compensation statute] solely because a 'spouse' did not go through a formal marriage ceremony. Id. at 1026. (E.A., footnotes omitted)

9. See also *Hager v. Hager*, 558 P.2d 919 (AK 1976) (AS 04.55.210 (6), (statutory division of marital property as applied to common-law marriage), AS 11.35.010 (obligation of child support), AS 11.35.100 (illegitimate children of both parents), AS 13.11.045 (inheritance through mother and father if acknowledged), AS 20.15.040 (consent of both parents for adoption).

The Alaska Constitution provides:

> *The right of the people to privacy is recognized and shall not be infringed.* The legislature shall implement this section. Article 1, §22. (E.A.)

The Alaska Supreme Court has declared the intimate relationships of its citizens will not be breached or intruded upon absent a compelling state interest. *Ravin v. State*, 537 P.2d 494 (AK 1975), *Gray v. State*, 525 P.2d 524 (AK 1974); see also *Breese v. Smith*, 501 P.2d 159 (AK 1972) (Right to privacy, and right to be left alone).

4. The Court of Appeals Opinion Decides the Important Question of the Scope of the Federal Marital Privilege in Conflict with Applicable Decisions of the U.S. Supreme Court, and Federal Statutes which Establish a Common-Law Marital Privilege that Exists Until a Marriage is Terminated by Divorce Through Judicial Decree.

Under Rule 501, the Federal Courts are not constrained to apply state law with regard to privileges in criminal matters. *Lewis v. United States*, 517 F.2d 236, 237 (9th Cir. 1975), held:

> In determining the Federal law of privilege in a *federal question case ...the rule ultimately adopted, whatever its substance, is not state law but federal common law.* (citation omitted) (emphasis added).

The legislative history of Rule 501, 10 demonstrates that while Congress did, while rejecting Article V (privileges) as promul-

10. See: AM Jur 2d. New Topic Service, Federal Rules of Evidence, Paragraph 501.2 at No. 56; H.R.No. 93-650 93rd Cong. 1st Sess., 8-9 (1973) S.R. Op. No. 1277, 93rd Cong. 2nd Sess., 6-7, 11-13 (1974); H.R. Cong. Rep. No. 1597, 93rd Cong. 2nd Sess, 7-8 (1974); U.S. Cod. Cong. and Admin. News 1974, page 7098. See also, the remarks of Congressman Hungate, Chairman of the House Judicial Committee on Criminal Justice, stating that Rule 501 was "not intended to freeze the law of privileges as it now exists", appearing at 120 Cong. Rec. H. 12254 (1974), and Joint Explanatory Statement of the Committee of Conference, page 7, on 501, "*Both the House and Senate bills provide that federal privilege law applies in criminal cases*" (emphasis added).

gated by the U.S. Supreme Court, refuse to deliniate non-constitutional privileges, the intent was "...the courts should continue to develop the federal common-law on a case to case basis." *Lewis*, supra at footnote 4.

The cases cited by the decision for the proposition that state law controls are not applicable. *U.S. v. Apodaca*, 522 F.2d 568, 571 (10th Cir. 1975), deals with sham marriage, (citing *Lutwak v. U.S.*, 344 U.S. 604). *U.S. v. Neeley*, 475 F.2d 1136, 1137 (4th Cir. 1973), interprets the Virginia privileged communications, Va. Code Ann. ¶8-289 (1957). *U.S. v. McElrath*, 377 F.2d 508, 510 (6th Cir. 1967) treats bigamy.

In *Hawkins v. U.S.*, 358 U.S. 74 (1959), the Court established a marital privilege for purposes of federal common law. In *Lutwak v. U.S.*, 334 U.S. 604, 615 (1953), the Court recognized the reason for the privilege is to "*Protect the sanctity and tranquility of the marital relationship*". (E.A.)[11]

In 1959, Justice Black, speaking for the Court, stated:

> The basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to foster family peace not only for the benefit of husband, wife and children, but for the benefit of the public as well...much more bitterness would be engendered by voluntary testimony than that which is compelled...*(while) the fact a...wife testifies against the other voluntarily is strong indication that the marriage is already gone...Not all marital flare-ups in which one spouse wants to hurt the other are permanent.* ...The wide-spread success achieved by courts throughout the country in conciliating family

11. See also; 8 Wigmore on Evidence ¶2228 (policy to preserve chances of reconciliation), "The Husband and Wife Privileges in Federal Criminal Procedure" 24 Ohio St. L. J. 144, 152 (1963), and "Policy, Privacy and Perogatives: A Critical Examination of the Proposed Federal Rules of Evidence as they Effect Marital Privilege", Calif. L. R. Vol. 61: 1353 (1973).

differences is a real indication *that some apparently broken homes can be saved provided that no unforgivable act is done by either party. Adverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage. Hawkins v. U.S.*, supra., at 358 U.S. 77-79. (E.A.)

While *Pereria v. U.S.*, 347 U.S. 1,6 (1964) held that divorce terminated the privilege; merely filing a complaint is not sufficient. Without a final judicial decree of divorce, there is a presumption reconciliation is possible, and the government should not force an irresistable "wedge" between the parties.[12] *U.S. v. Smith*, 533 F.2d 1077 (8th Cir. 1966) indicates clearly the couple was divorced prior to trial. *U.S. v. Fisher*, 518 F.2d 836, 838 (2nd Cir. 1972), involved a final divorce decree, with an appeal pending.[13]

4. The Opinion has Decided Important Federal Questions by Denying Equal Protection, the Right to Privacy, or the Protection of Rule 501 to the Petitioner's Common-Law Marriage and the Issues have not Been, but Should be, Settled by this Court.

The opinion denies the shield of equal protection, privacy, or Rule 501 to a marriage valid at Federal common law. Said protections are denied if a state in some manner prohibits common-law marriage. This issue has never been settled by the

12. "After the great cause of the dissolution...has come to pass, and *the parties are not only alieniated in spirit, but also solumly freed by judicial decree*...(the privilege would cease). 8 Wigmore, supra at ¶2227. (E.A.) See also *Hendrickson v. Harry*, 200 Mich. 41, 164 N.W., 393, 166 N.W. 1023, 1917 (wife cannot testify during pendency of divorce action; allowed to testify once the divorce is final) *Moss v. Moss*, Q.B.D. (1963) All E.R. 829 (England) (husband cannot testify during period of judicial separation.

13. The *Fisher* court distinguished *Hawkins*, supra, by noting Fisher had no children by the witness, had two children by another woman, and had not lived with the witness for eleven years and actually had been granted a divorce on his own motion and testimony. *Fisher*, supra, at 518 F.2d 840.

Court, and is one of great importance which is likely to reoccur on a wide-spread scale throughout the lower courts such that the Court should give definite direction; to protect common-law marriage from the type of invasion reflected by the record in this proceeding.[14]

It is manifest that a substantial portion of the marital relationships now ongoing in the United States are common-law.[15]

The Court has previously applied an equal protection analysis to prevent discrimination against illegitimates, and other persons who by choice or necessity choose to live outside of the strict moral dictates of society. In *Levy v. Louisana*, 391 U.S. 68, (1969), the Court held that a state could not deny recovery for wrongful death in a court action to the illegitimate offspring of a mother, since the classification of the illegitimacy of the child is not a rational basis for the purpose of the statue and therefore denys equal protection. In *Labine v. Vincent*, 401 U.S. 532, (1971), the Court upheld Louisiana's intestate succession which precluded an illegitimate child from claiming the same

14. Many legal scholars trace the origin of the marital privilege to the "natural repugnance theory" with regard to delving into the intimate aspects of one's marital existence.

15. See "Property Rights of De Facto Spouses Including Thoughts on the Value of Homemaker Services", Fam. Law Quart. at 102, in which it was stated:

> 1. *Estimates based on 1970 and 1960 census figures suggest that the number of unmarried couples living together increased eight-fold during the 1960's.* Note, *"In re Cary:* A Judicial Recognition of Illicit Cohabitation", 25 Hastings L.J. 1226 (1974) ...2 U.S. Bureau of the Census 1970 Census of population, Persons by Family Characteristics, table 11, at 4B; 2 U.S. Bureau of the Census 1960 Census of Population, Persons by Family Characteristics, table 15 at 4B. (E.A.) (Appearing at footnote 1).

In *Marvin v. Marvin*, No. L.A. 30 520, 50 Cal. App. 3d 84 (1975), _____ P.2d _____ (Calif. 1977), the California Supreme Court recognized this phenomenon, in upholding the right to sue on a common-law marriage contract, overruling a long line of precedent.

rights as a legitimate child, based upon the unique historical state interest in determining property rights, but specifically distinguished between property rights and the issue of benefits provided by the State.

The marital relationship, is a relationship at the core of the right to privacy, in that said relationship necessarily involves intimate private communications, and procreation, such that this Court should be particularly sensitive to an arbitrary discrimination against common-law marriage.[16]

Since Mr. Lustig met the criteria of *Katz v. U.S.*, 389 U.S. 347 (1967), in that he had, in fact, an expectation of privacy in the communications and relationship with his common-law wife due to the confidential nature of the relationship, and society recognizes these expectations as reasonable, the marital privilege should attach.

Moreover, even absent equal protection, or the right to privacy, the importance of common-law marriage in current society means that the Court should recognize the common-law marital privilege under Rule 501 since the privilege meets all of the criteria enunciated for whether a common-law privilege is desirable.[17]

16. For the proposition that the Court has been particularly sensitive to such relationships, see *"Roe and Wade*: Does Privacy have a Principle" 26 Stan. L. R., 1161 (1973-74). The right to privacy emulates from the "penumbras" of the various other amendments (i.e. 1st, 9th, and 4th Amendments).

17. 8 Wigmore, Evidence §2285 delineates the criteria as:

> (1) The communications must originate in a confidence that they will not be disclosed. (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties. (3) The relation must be one which in the opinion of the community ought to be sedulously fostered. (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefits thereby gained for the correct disposal of litigation.

Thus, it is imperative that the Court grant certiorari in order to delineate the scope of the protection afforded a common-law marriage relationship in today's society, where such a substantial portion of said society is embraced in such relationships.

B. The Jury Instruction "...Very Little Evidence is Necessary to Show that a Particular Defendant was Part...(of a Conspiracy) ...Slight Evidence is Enough".

1. There is a Direct Conflict Between the Ninth Circuit and the Fifth Circuit with Regard to Whether this Instruction Constitutes Reversible Error.

Over objection the trial court instructed:[18]

> Once a conspiracy is shown to exist, *very little evidence is necessary to show that a particular defendant was a part of it. Slight evidence is enough.* Each member of the conspiracy is responsible not only for his own acts, but also for the acts and statements of the other members done and made in furtherance of the scheme. They are agents for each other. What one does pursuant to the common purpose all do. (Cert. Record 537). (E.A.)

The Ninth Circuit held:

> It is well established that once the existence of a conspiracy is established, only *slight* evidence is required to connect any defendant with it. *United States v. Freie*, 545 F.2d 1217, 1221 (9th Cir. 1976); *United States v. Westover*, 511 F.2d 1154, 1157 (9th Cir. 1975). (Emphasis in original). *U.S. Lustig*, supra, at 1275-1276.

Freie, supra, and *Westover*, supra actually deal with the standard for a directed verdict, relying on *U.S. v. See*, 505 F.2d 845 (9th Cir. 1974) (standard for directed verdict).

This holding directly contradicted the Fifth Circuit rule that the instruction is reversible error. *United States v. Murray*, 527

18. The Co-defendant below, Gregory D. Pederson, filed a Petition for a Writ of Certiorari on July 18, 1977 entitled *Gregory D. Pederson, Petitioner, v. United States of America*, Respondent, Case No. 77-5118, with regard to this identical issue. (Filed in *Forma Pauperis*).

F.2d 401, 409 (5th Cir. 1976); *U.S. v. Hall*, 525 F.2d 1254, 1255 (5th Cir. 1976); *U.S. v. Marionneaux*, 514 F.2d 1244, 1249 (5th Cir. 1975); *U.S. v. Brasseaux*, 509 F.2d 157, 161 (5th Cir. 1975).[19]

> ...the standard for *appellate* review...is whether slight evidence connected a particular defendant with the alleged conspiracy...It is, of course, error for the trial court to charge the jury in terms of 'slight evidence', *Murray*, supra, at 404. (citations omitted) (emphasis in original)

It is imperative this Court give direction with regard to this important issue, due to the large instance of conspiracy trials now coming before the lower courts. A substantial portion of the defendants therein are being tried on circumstantial evidence.

It is manifest the Fifth and Ninth Circuits are in absolute contradiction on this instruction, which dilutes the most basic principal of criminal law, the right to be convicted only on proof beyond a reasonable doubt as to each element of the alleged offense.[20]

2. The Instruction Conflicts with Decisions of this Court with Regard to Requiring Proof Beyond a Reasonable Doubt as to Each Element of the Offense Under the Due Process Clause.

The instruction clearly dilutes the standard of proof beyond a reasonable doubt. The Court held *In the Matter of Samuel*

19. Both the District Court, and the Court of Appeals, were on notice, that the cases cited dealt with the issue of the standard for a directed verdict and the Fifth Circuit rule was that the instruction was reversible error. (TR. 2108).

20. The error permeated all of the verdicts, since it allowed the use of statements and acts by co-conspirators with regard to the other counts of the indictment; there was no limiting instruction that the jury must find conspiracy before considering such evidence (TR 298), and the court refused to allow individual verdict forms with signatures for each juror, as to each defendant, for each count. (TR 2115, 2116).

Winship, 397 U.S. 358, 364, 25 L.ed.2d 368, 90 Sup. Ct. 1068 (1970):

> Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, *we explicitly hold that the Due Process Clauses protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.* (E.A.)

Whether a particular defendant is part of a conspiracy is *a fortiori* an essential element of the crime of conspiracy.

> *...the erroneous instruction reduced the level of proof necessary for the government to carry its burden* by possibly confusing the jury about the proper standard or even *convincing jury members that a defendant's participation in the conspiracy need not be proved beyond a reasonable doubt*. Hall, supra, at 1256 (E.A.).

C. The Denial of Effective Assistance of Counsel of One's Choice.

Due to a mistaken rigid construction of the speedy trial act, 18 U.S.C. 3164, repeated motions for continuance or severance, were denied, despite only four days for counsel of choice to prepare for trial.[21] The opinion holds: (1) It was Mr. Lustig's fault he did not obtain other counsel despite incarceration in substandard conditions, "frozen assets", "no attorney in town would touch the case", and only thirty days elasped from arraignment to trial. (2) Even with only four days to prepare,

21. The opinion disregards: (1) the original attorney never entered a general appearance (TR Vol XI, pg. 2), (2) the defendant expected to hire his partner, (3) conflicts as to the defense lead him to move to withdraw at the arraignment on the superseding indictment. Jail conditions severely interferred with attempts to seek counsel. The record reflects all efforts possible to obtain counsel. The court was told that no one would touch the case with the financial constraints imposed.

there was insufficient prejudice to mandate reversal. *U.S. v. Lustig*, supra, at 1267-1269.[22]

1. The Opinion Conflicts with Other Ninth Circuit and D.C. Circuit Decisions and Decisions of this Court with Regard to the Test for Prejudice from Arbitrary Interference with the Right to Counsel of One's Choice.

The cases cited in the decision were miscited or improperly distinguished. *Glenn v. U.S.*, 303 F.2d 536, 543 (5th Cir. 1962) contained no indication of interference with the ability to hire counsel, with a specific finding below of sufficient means.[23]

While a judge does have discretion to grant or deny continuances, in *U.S. v. Harris*, 501 F.2d 1 (9th Cir. 1974), and *Dant v. U.S.*, 405 F.2d 312, 315 (9th Cir. 1968), there was "no

22. The opinion finds no prejudice but holds the failure of counsel (retained four days prior to trial) to file instructions five days before trial waived any objections to the conspiracy instructions. Said lack of preparation was a direct contributing factor to failure to: (1) subpoena Phillis Resnek (TR. 2027) (2) obtain a suppression hearing (3) prepare for effective cross-examination of Callie Newton Lustig as to motive for bias or prepare effective surrebuttal of the extremely damaging testimony of Callie Newton Lustig. (TR 1924 for confusion of counsel with the name of common-law wife). See *Lofton v. Procunier*, 487 F.2d 434, 435 (9th Cir. 1973). Resnek was critical for confrontation as to both the twenty-seven phone calls to the police indicating that Mr. Lustig was a dealer and the nature of Callie's motive for bias.

23. The opinion avoids this issue by stating the court would have approved a fee agreement and "one could only infer that some attractive consideration prompted (present counsel to enter the case)". This ignores: (1) the right to retain counsel of one's choice. (2) there was not an attorney in town that "would touch this man. The only thing he has is his property, he doesn't have his cash." (TR 3/16/76, A115-73 Cr. at 40). (Note that Judge Plummer, to date, still has not released the assets). The "inferences" to the effect that present counsel "immediately rented an office, hired a secretary, investigator, research assistant, and another attorney to work on the case" (Note 5) are not supported by the record and are either exaggeration or misstatements. *Mardian v. U.S.*, 546 F.2d 973 (D.C. Cir. 1977) is improperly distinguished. As in *Mardian*, there was disparity in the evidence between Mr. Lustig and his co-defendants, (direct sales vs. circumstantial evidence), and it is reverse logic to argue that since the trial had not begun before the motions for continuance in the instant case, *Mardian* is inapplicable.

rational explanation" for the continuance, with counsel announcing ready at trial. *U.S. ex. rel. Baskerville v. Deegan*, 428 F.2d 714, 716 (2nd Cir. 1970), contained no dissatisfaction with counsel until trial. *U.S. v. Simmons*, 357 F.2d 763, 764 (9th Cir. 1972) presented a continuance request at trial, with "suspicious" reasons given for requesting new counsel. *Torres v. U.S.*, 270 F.2d 252, 255 (9th Cir. 1959) relied on previous continuances granted to obtain counsel. Here, the record reflects continuing concern by Mr. Lustig and his initial attorney for his right to counsel, and good cause for the continuance, due to the necessity for locating witnesses, with the only reason for the denial the mistaken belief that the Speedy Trial Act prohibited a continuance.

The wrong test for prejudice is applied. In *Lofton v. Procunier*, 487 F.2d 434, 435 (9th Cir. 1973), a defendant was forced to trial after counsel failed to show, despite a prior four week continuance. The Ninth Circuit reversed and remanded for an evidentiary hearing, indicating *de novo* findings of lack of prejudice could not be made for a denial of the right to counsel.

> *The required adequacy of counsel...can...*be *determined only when conducting an evidentiary hearing directed to the specific issue.*
>
> ...The most that can be seen from the record is...(the *attorney)...possibly did as well as any attorney could have done when the grave responsibility was suddenly thrust upon him without adequate opportunity for preparation*....an evidentiary hearing must be conducted to determine whether *Lofton* was effectively deprived of his Sixth Amendment rights....we reiterate that to this time, *there has been no hearing in any court in which the accuracy of the representations made by Lofton and his unprepared attorney can be tested. Lofton*, supra, at 436 (9th Cir. 1973) (E.A.)

In *Glasser v. U.S.*, 315 U.S. 60, (1942) the Court held:

> The right to have the assistance of counsel [of one's choice] is *too fundamental...to allow courts to indulge in nice calculations as to the amount of prejudice* arising from its denial. *Glasser*, supra, at 62 S. Ct. 467 (E.A.)

In *Chapman v. State of California*, 315 U.S. 75, Mr. Justice Stuart, concurring stated at page 837:

> *...when a defendant has been denied counsel at trial, we have refused to consider claims that this constitutional error might have been harmless.* (E.A.) (citing *Glasser*, supra)

In *Geders v. U.S.*, 425 U.S. 80 (1976), this court recognized a fundamental right to consult with counsel on the night prior to testifying, with harmless error not applicable.[24]

The Court should grant certiorari to delineate the precise test for prejudice from an arbitrary denial of a continuance to enable counsel of choice to prepare a defense, for cross-examination, and to call witnesses.

2. The Important Federal Question of the Impact of the Speedy Trial Act on the Right to Counsel has not Been, but Should be, Settled by this Court.

The Court has never ruled, whether a strict construction of the Speedy Trial Act, 18 U.S.C. §3164, may be used to subvert the right to counsel of choice. In *Powell v. Alabama*, 287 U.S. 45, (1932), this court said:

> It is hardly necessary to say that, the right to counsel being conceded, *a defendant should be afforded a fair opportunity to secure counsel of his own choice.* 287 U.S. 53. Cited at *Glasser v. U.S.*, 315 U.S. 60, 70 (1942). (E.A.)

24. Mr. Lustig was forced to consult the night before testifying within sight and hearing of the co-defendants in a crowded jail hallway. (TR 1587) (see also *U.S. v. Decoster*, 487 F.2d 1197 (D.C. Cir. 1973) (standards of effective assistance). The jail was severely overcrowded and the subject of a class action suit for reasonable access to counsel. (TR. 1670, 1587, 1590) TR A115-73 Cr., 4/27/76 at 3, 5, 6, 8, 17, 18, and 19 (class action suit filed as exhibit).

The Court spoke again *In re Groban*, 352 U.S. 330, 332 (1957):

> A defendant in a state criminal trial has *an unqualified right, under the due process clause, to be heard through his own counsel.* (E.A.)

The seventh Circuit, in *United States v. Seale*, 461 F.2d 345 (1972), condemned the failure to make sufficient inquiries into objections to proceeding to trial without counsel of choice or to allow for justifiable delay.[25]

> If the Sixth Amendment rights to the effective assistance of counsel means anything, it certainly means that it *is the actual choice of the defendant which deserves consideration.* 461 F.2d at 358. (E.A.)

In *Mardian*, supra, at 546 F.2d 977, Bazelon wrote:[26]

> ...in the trial of conspiracy cases involving a number of defendants...the liberal rules of evidence and the wide latitude accorded the prosecutor may, and sometimes do, operate unfairly against an individual defendant...*Glasser v. U.S.*, 315 U.S. 60, 76 (1942). *The dangers of transference of guilt are such that the court should use "every safeguard to individualize each defendant in his relation to the Mass." Kotteakos v. U.S.*, 328 U.S. 750, 774, 773 (1946). See *Blumenthal v. U.S.*, 332 U.S. 539, 559 to 560 (1948). (E.A.)

The Court should grant certiorari to hold the Speedy Trial

25. See also *U.S. v. Mitchell*, 354 F.2d 767 (2nd Cir. 1966) Selection of counsel has special meaning in unpopular causes.

26. Here, as in *Mardian*, supra, the continuance to enable counsel of choice to prepare was not due to any fault of counsel as attributable to the defendant. See also, *Releford v. U.S.*, 288 F.2d 298. (9th Cir. 1961) (reasonable continuance to guarantee counsel of choice).

Act, 18 U.S.C. 3164 cannot be perverted to deny one the right to effective assistance of counsel of choice.[27]

D. The Warrantless Seizure of the Opaque Parcel from Mr. Lustig's Truck and the Warrantless Search of the Parcel at Police Headquarters.

1. The Opinion Decides the Important State Question of the Permissible Scope of an Inventory Search and Seizure in Conflict with Applicable Alaska Law and *South Dakota V. Opperman*, 428 U.S. 364 (1976).

The opinion incorrectly states the sealing machine was found during a proper inventory search, pursuant to impounding, holding the seizure valid under 13 A.A.C. §2.375, and *South Dakota v. Opperman, supra*. In Alaska, under *Daygee v. State*, 514 P.2d 1159 (Alaska, 1973), and 13 A.A.C. 02.350, an inventory search is invalid where an arrestee has means of removing the vehicle, desires to do so, and there is no contraband in plain view.[28]

2. The Opinion Decides the Important Federal Question of a Permissible Warrantless Seizure and Search Pur-

27. See the remarks of Chief Justice Warren Burger, at the 53rd annual meeting of the American Law Institute, paraphrased at 19 Cr.L. Rptr. 2210 (1976) to the effect the act is too inflexible, particularly in complex cases requiring extensive trial investigation and preparation.

28. Mr. Lustig made repeated demands to allow his friends to remove his vehicle, who were standing by with a boom truck. (Tr. 1345-1348). These demands were made prior to the search of the opaque brown paper bag containing the sealing machine. Under *South Dakota v. Opperman, supra*, an inventory search by State officers is dependent upon State law and necessity. Alaska Troopers served a Federal warrant to arrest Mr. Lustig, and searched the bag at Troopers headquarters, thus Alaska law is relevant. See also *Altman v. State*, 19 Cr. Rptr. 882 (9/1/76) (Ct. of App., Florida, 7/30/76), (impound must be necessary for inventory search), and *United States v. Lusk*, A-75-104 Cr. (U.S.D.C. Alaska 1/7/76) (inventory invalid if arrestee has means of removing the vehicle under 13 A.A.C. 02.350) (Appellant's brief below at 79). See e.g. *United States v. Colandra*, 414 U.S. 338 (1974).

suant to an Arrest in Direct Conflict with *U.S. V. Chadwick*, 97 S.Ct. 2476, 45 L.W. 4798 (1977)

The actual discovery of the sealing machine occurred at the police station,[29] where a further search of the bag was done by the arresting officers.[30] (Tr. 765, 768).

In *Chadwick*, supra, the Court held:

> "*Once law enforcement officers have reduced property not immediately associated with the person of the arrestee to their exclusive control*, and there is no longer any danger that the arrestee may gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest. 97 S.Ct. at 2485, 45 L.W. at 4801.
>
> . . .
>
> In our view, *when no exigency is shown to support the need for an immediate search, the warrant clause places the line [where a warrant is needed] at the point where the property to be searched comes under exclusive dominion of police authority*. 97 S.Ct. at 2486, 45 L.W. at 4801. (E.A.)

Since *Chadwick, supra*, was rendered by this court after the

29. The arresting officer opened the bag, and seized it after seeing the scale, but did not find the sealing machine until a further search was conducted at Trooper headquarters, after Mr. Lustig's friends had arrived with a boom truck to remove the vehicle, and the officers had refused to allow this procedure contrary to 13 A.A.C. 2.350. Since the bag was in the complete control of the police, and was searched "remote in time (and) in place from the arrest" *Preston v. United States*, 376 U.S. at 367 (cited in *Chadwick, supra*, at 97 S.Ct. 2485, 45 L.W. 4801), the search was invalid.

30. In *Chadwick*, supra, as in the instant case, the search occurred approximately an hour and a half later at the police station, and the property searched was in the control of the police. While in *Chadwick*, the police clearly had probable cause to seize the container, here, since the arrest was not contemporaneous with the alleged offense, there was no probable cause to believe that the scales were contraband, or the fruits of a crime, so as to justify a warrantless seizure, even during the initial search of the car. See *Lemon v. State*, 514 P.2d 1156 (Alaska, 1973), (contemporaneous nature of offense and arrest gives probable cause for search pursuant to arrest for evidence. See also *McCoy v. State*, 491 P.2d 120 (Alaska, 1971).

instant decision, the Court should grant certiorari to summarily reverse.[31]

E. The Denial of Confrontation for Bias and the Denial of a Two Hour Continuance to Produce a Critical Witness.

The opinion excuses the denial of confrontation on motive for bias as to Tarnef and Callie Newton, finding said matters collateral.[32]

Cross-examination of the most damaging witness, Callie Newton, was restricted as to whether she was biased due to financial interest (her civil suit; TR 1988) or due to the influence by Phyllis Resnek, her lesbian lover. (TR 2013, 2015).

Counsel was prohibited from confronting the source of hearsay statements to the police (i.e. 27 phone calls stating Mr. Lustig was a drug dealer), or producing evidence of Callie's bias, (TR 2046, 2058, 2084, 2064) by the denial of a two hour continuance (TR 2025, 2675, 2081, 2082) to serve a subpoena

31. For other Alaska cases restricting the permissible scope of a search incidence to arrest, holding that a warrant is needed for further intrusions occasioned by any such search, see *Anderson v. State*, 555 P.2d 251 (AK 1976), *State v. Spietz*, 531 P.2d 521 (AK 1975), and *Schraff v. State*, 544 P.2d 834 (AK 1975). For the Alaska counterpart of *Chadwick, supra*, see *Erickson v. State*, 507 P.2d 508 (AK 1973) (warrant needed where closed container in control of the police, despite probable cause). See also *United States v. Martin*, 21 Cr. Rptr. 2045, (4/4/77) (D.C. Cir. 1977), (warrant needed for suitcase despite probable cause). See also *Faubion v. United States*, 424 F.2d 437, 440 (10th Cir. 1970) and *People v. Marshall*, 69 Cal. Rptr. 558, 442 P.2d 668), (warrantless search of closed containers in police custody unconstitutional).

32. The defense attempted to cross-examine Tarnef as to potential charges for narcotics, felony murder, perjury, and arson. Several offers of proof were made as to relevance. (TR 1514, 1791, 1792, 1805, 1516, 1517, 1518) For Tarnef's history of lying for hire see "*Tarnef v. State, Miranda* is Alive and Well in Alaska", UCLA-AKA L.R., Vol. 4, No. 1. See also, *Tarnef v. State*, 512 P.2d 923 (AK 1973) and *Tarnef v. State*, 492 P.2d 109 (AK 1971).

on Phyllis Resnek who was avoiding process (TR 2051).[33] *C. F. Dutton v. Evans*, 400 U.S. 74 (1970), *Bruton v. U.S.*, 391 U.S. 123 (1968), *Lemmon v. State*, 514 P.2d 1151 (AK 1973). In *Davis v. State of Alaska*, 415 U.S. 308, (1974) the Court held motive for bias is never collateral; it is proper to cross-examine as to motive for testifying, due to potential or actual pending charges. See also *Evans v. State*, 550 P.2d 830 (AK 1976)[34] In *Hutchings v. State*, 518 P.2d 767 (AK 1974), the court held:

> *There are no special rules of 'proper impeachment' for bias. The credibility of witnesses is always a material issue....* when evidence is offered to impeach for *bias...[where]...the evidence tends to reasonably demonstrate* the existence of some facts, state of mind, or condition that a reasonable person would take into account in assessing the credibility of the witness under attack, *...the balance must be weighed in favor of admissibility* ...Id. at 769. (E.A.)

The Court should grant certiorari to establish clearly that "harmless error" cannot be applied to denial of confrontation for bias or motive, in the face of a clear offer of proof as to relevance.

33. The Ninth Circuit opinion holds at footnote 7 the continuance was properly denied since not requested until the defense had rested. The defense rested early, to accommodate the prosecution and the court, who expressed concern for Mr. Tarnef's safety over the coming weekend. (TR. 1939, 2021, 1583-1586). Efforts to investigate and locate Ms. Resnek were made from the time counsel of choice entered the case. (TR 2025-2027). Callie's testimony contained references to hearsay statements by Resnek. The exclusionary rule for witnesses was violated by a 'relay' by Lee Peterson, former Ass. U.S. Atty. to Resnek, to Callie, inducing her to testify by a false characterization of Mr. Lustig's testimony. (TR. 2014) An offer of proof as to the relevance of Phyllis Resnek for bias and the source of hearsay was made at TR 2082-2089.

34. For cases holding mere possibility of prosecution sufficient for bias see *R. L. R. v. State*, 487 P.2d 27 (AK 1971), and *Whitton v. State*, 479 P.2d 302 (AK 1970). (Undue confrontation restriction reversible per se) See also, *Alford v. U.S.*, 282 U.S. 687 (1931), *Hughes v. U.S.*, 427 F.2d 66 (9th Cir. 1970) (undue restriction on confrontation as to fear of possible prosecution).

F. The Refusal to Allow an Individual Poll as to Each Count Where the Petitioner had Admitted One Count in his Testimony.

Despite the petitioner admitting one count (Count V, possession) in his defense, the Court denied a specific request for an individual poll as to each count.[35]

> The Court: Do you wish the jury polled?
> Mr. Weidner: *Your Honor, I would request an individual poll at this time.*
> The Court: *I would ask that the jury be polled in the usual way.*
> Mr. Weidner: *I would ask that the jury be polled as to each count.*
> The Court: Ladies and gentlemen, the clerk will call the roll. If the verdict that was read was a true verdict you will answer "yes". If it is not, answer otherwise. (TR 2249). (E.A.)

This constitutes blatant refusal of the constitutional and statutory right to "look the jury in the eye" as to each count.[36] The Ninth Circuit opinion, cites *Shibley v. U.S.*, 237 F.2d 327, 334 (9th Cir. 1956), cert. denied, 352 U.S. 873 (1956), as authority for its holding without indicating that in *Shibley*, supra, the issue was raised as a result of a clerical error, was mooted on appeal, and there was no objection below.

While generally, the cases reversing for deficiency in the poll

35. The Court "reminded" defense counsel it was unnecessary to take "exception" to error to preserve it. The jurors had been asked juror by juror as to the combined counts for each co-defendant; thus an "individual poll" had to mean an individual poll as to each count.

36. While the other circuits, or the Court, have never been squarely faced with this issue, all hold that there is a common-law and statutory right to a poll of the jury. *Humphries v. District of Columbia*, 174 U.S. 190 (1899), and a denial of said poll constitutes reversible error. See generally *United States v. Edwards*, 469 F.2d 1362 (5th Cir. 1972); *U.S. v. Sexton*, 456 F.2d 961 (5th Cir. 1972)

have been those where some confusion was manifested,[37] since the purpose is to "ascertain for a certainty that each of the juror approves of the verdict as returned; that no one has been coherced or induced to sign a verdict to which he does not fully assert". *Humpries*, supra, the Court should grant certiorari to adopt a per se rule for reversal where there has been an intentional denial of the right to a poll as to each count of a multiple count indictment.[38]

G. The Arbitrary Refusal of the Right to be Present, or a Record, at the Communication with and Excusal of a Juror.

The opinion excuses the intentional denial of the right to be present, or to a record, by holding that hearings are unnecessary on question of fitness, in-camera inquiries are permissible, and no prejudice was shown.[39]

37. See *Williams v. U.S.*, 419 F.2d 740 (1970), *U.S. v. Edwards*, supra; *U.S. v. Sexton*, 456 F.2d 961, (5th Cir. 1972) Mr. Lustig was prevented from demonstrating the fact that one juror wished to reputiate some of the counts during the poll, by the denial of the individual poll. See paragraphs 5, 6, 7 and 8 of the affidavit of defense counsel of May 19, 1976 (R. 626) where an offer of proof was made to this effect.

38. The defendant specifically requested separate verdicts as to each count with spaces for signatures of the individual jurors. (TR. 2116) See *Posey v. U.S.*, 416 F.2d 545, 553 (5th Cir. 1969. For the roll of the poll in resolving confusion see *U.S. v. Farries*, 328 F.Supp. 1074 (6th Cir. 1971) (Poll as to each count of a seven count indictment), *U.S. v. Visuana*, 395 F.Supp. 352 (1975) (individual poll; not guilty in Count I; guilty in Count II), *U.S. v. Lockhart*, 366 F.Supp. 843 (D.C. Penn 1973) affirmed 495 F.2d 1369 (uncertainty during poll resolved by further poll). See also *Lee v. State*, 509 P.2d 1088 (Alaska 1973) (right to be present at return of verdict encompasses common-law right to look the jury in the eye). See also, Rule 31(d) of the F. R. Crim. P. for right to poll jury as to verdict and 18 U.S.C. §§3771 and 3772.

39. The opinion claims the dismissed juror divulged information making him believe the appellant was guilty. This was never established; the trial judge simply made unsworn conclusionary implications he thought the juror would be unfair. Mr. Lustig requested a hearing to argue to the judge as to the juror's fitness, and preserve the record for appeal.

The cases cited are improperly cited, or are clearly distinguishable. *U.S. v. Domenach*, 475 F.2d 1229, 1232 (2nd Cir. 1973) dealt with dismissal for cause (absence) manifest to counsel for defendant. *U.S. v. Cameron*, 464 F.2d 333, 335 (7th Cir.) presented disability manifest in open court (falling asleep). *U.S.v. Crisona*, 416 F.2d 107, 119 (2nd Cir. 1969), miscited by the instant decision to avoid the right to be present issue, relied on absence of objection or demand for hearing. *U.S. v. Houlihan*, 332 F.2d 813 (2nd Cir. 1964) relied on exigent circumstances foreclosing an evidentiary hearing.[40] See also, *U.S. v. Woodner*, 217 F.2d 649, 652 (2nd Cir. 1963) (necessity for hearing and record). To date court orders prohibit defense inquiry of the juror as to what occurred in chambers or what he indicated to the other jurors. *U.S. v. Goodman*, 457 F.2d 68, 73, is miscited since it relied on an evidentiary hearing to cure any possible prejudice. It is likewise, error for the decision to hold that Mr. Lustig approved of the alternate, to attempt to avoid the issue as harmless error.[41]

1. The Opinion is in Conflict with the Other Courts of Appeals, and this Court with Regard to the Right to be Present at Critical Stages of the Proceedings Including Communications with the Jury.

Rule 43, of the F. R. Crim. P. provides:[42]

> The defendant *shall be present* at the arraignment, *at every stage of the trial including the empanneling of the jury and the return of the verdict* ...(E.A.)

40. Here, no extrigent circumstances existed; both Mr. Lustig and counsel were demanding a hearing.

41. The petitioner reserved one preemptory challenge as to the trial jurors. The petitioner did exhaust peremptory challenges with regard to the alternates, and the reservation of the one perempt for the trial jurors was to avoid seating the juror Scott. (i.e. the alternate eventually seated over objection). (TR. at 130). See Petitioner Lustig's Reply Brief in 76-2661 at page 4-6, for a full explanation of the jury selection procedure in the U.S. District Court for Alaska.

This right existed at common-law in the form of a defendant's privilege of presence, and is grounded in the Sixth Amendment to the U.S. Constitution,[43] and Article 1, §11 of the Alaska Constitution.[44]

While the Court has stated that the right "deals with the rule of common-law and not with constitutional constraints", *Snyder v. Commonwealth of Mass.*, 78 L.ed 674 (1927), the lower Federal courts have often found it based on the constitution.[45]

In delineating the important purpose of the rule the Court has stated:

> *A leading principal that pervades the entire law of criminal procedure is that after the indictment is found, nothing shall be done in the absence of the prisoner. Lewis v. U.S.*, 146 U.S. 370, 372 (1882), (E.A.).

In, *U.S. v. Arrigada*, 451 F.2d 487 (4th Cir. 1971), cert. denied 405 U.S. 1018 (1972) the court recognized Rule 43 applies to:

> "*proscribe any communication by [the] court with the jury, whether before or after it has begun its deliberations*, without the presence of the defendant (and) is a salutary provision which should be scrupulously observed by trial judges. (E.A.)

42. See also AK R. Crim. P. 38, encompassing the same language.

43. See 82 Moore's Fed. Pract. §43.02, pg. 43-3; and see *Brown v. State*, 372 P.2d 785, 788, at footnote 8 (AK 1962) (Sixth Amendment Origins).

44. *Brown v. State*, supra, at footnote 9.

45. See Wright, Federal Practice and Procedure, Crim., Section 721, p. 193 and citations at footnote 3 therein.

In *U.S. v. Chrisco*, 493 F.2d 232, (C.A. Mo. 1974) cert. denied 419 U.S. 847 it was noted that the:[46]

> ...process for impaneling a jury, during which *this rule ensures defendant's presence* encompasses *all steps of selecting a jury, including peremptory striking of members of the venire.* (E.A.).

U.S. v. Miller, 463 F.2d 600, (1st Cir. 1972) cert. denied 409 U.S. 956 (1973), noted that the challenging of prospective jurors is an essential part of the trial.

The decision ignores the point that Mr. Lustig was denied not only his right to be present during the judge's questioning in-chambers of the juror, but his right to an evidentiary hearing under oath as to the alleged prejudice, or the contact with the juror.[47]

In *Abbot v. Mines*, 411 F.2d 357 (5th Cir. 1969),[48] the court recognized the folly of requiring a showing of prejudice from an intentional interference with rules drafted to guarantee the preservation of a record as to said prejudice. *Metropolitan Paving Company v. Int Union of Op. Eng.*, 439 F.2d 300, 304

46. The cites to *Arrigada*, supra, and *Chrisco*, supra, are paraphrases of the language of said cases appearing at footnotes 17 and 21 to Rule 43 of the U.S.C.A.

47. See F. R. Crim. P. 26 (testimony taken in open court), F. R. Evid. 603 (oath or affirmation), F. R. Evid. 605 (judge not a competent witness).

48. See also, *Wade v. U.S.*, 441 F.2d 1046 (D.C. Cir. 1971) (standard for reversal from the denial of presence is any possibility of prejudice), *McKissick v. U.S.*, 379 F.2d 762 (5th Cir. 1967) (record must demonstrate lack of prejudice beyond a reasonable doubt.), *U.S. v. Crutcher*, 405 F.2d 339, 244 (2nd Cir. 1968) (denial of right to be present during voir dire jury selection cannot be harmless error), *Ware v. U.S.*, 376 F.2d 717, 721 (7th Cir. 1967), *Jones v. U.S.*, 299 F.2d 661 (10th Cir. 1962), *Parker v. U.S.*, 184 F.2d 488, 490 (4th Cir. 1950), *Arlington v. Robertson*, 114 F.2d 821 (3rd Cir. 1940) (civil), *Fina v. U.S.*, 46 F 2d 643, 644 (10th Cir. 1931) (right to be present linked to Fifth and Sixth Amendments.)

recognized that *Abbot* held the controlling issue is not whether a party can actually show prejudice by the failure to follow said rules, but whether the adopted precedure tends to weaken the institution of a jury trial.

The arbitrary denial of both presence, or a record under oath, coupled with a specific order prohibiting any contact with any juror, precludes an effective showing of prejudice, such that this Court should grant certiorari to lay down a rule of per se reversal for such conduct.

2. Certiorari Should be Granted Since the Opinion Sanctions the Departure by the Trial Court from the Accepted and Usual Course of Judicial Proceedings so as to Call for an Exercise of this Court's Power of Supervision.

In addition to intentionally denying the right to be present at either of the communications with the juror, the trial court prohibited an evidentiary hearing or record as to the contacts.[49]

This misconduct denied the defense the right to examine the excused juror as to communications of bias to other jurors, the right to argue to the judge as to whether the juror should have been excused, the right to a record of the reasons for the excuse, and the right to an oath given by competent witnesses. In addition, it violated several judicial cannons, and established rules of criminal procedure.[50]

49. After the first in-chambers contact, the judge specifically denied the request on the record to be present, and conducted further proceedings in-chambers without a record being made, (TR 330) and then specifically forbade any defense contact with the excused juror (TR 330) (R. 637), or an evidentiary hearing. The actual excuse of the juror occurred in-chambers, absent the defendant or counsel. (TR. 328). By written motion for mistrial, the judge was again on notice the following day as to the error. (R. 317-320).

50. See F. R. Crim. P. 26 (testimony in open court), F. R. Evid. 603 (oath or affirmation) F. R. Evid. 605 (judge not competent witness), F. R. Crim. P. 43 (right to be present), Cannon Jud. Ethics No. 22 (right to record). (Appendix c, infra.)

This Court should grant certiorari to establish clearly that in the absence of exigent circumstances, ex-parte contact with a juror, and unilateral decisions by the judge, cannot be condoned.

VII. SUMMARY AND CONCLUSION

The equal protection, due process, and privacy aspects of the common-law marital relationship, are of such substantial current importance that this Court should rule that the protection of Rule 501 attaches.

The Ninth Circuit decision presents a substantial threat to the concept of proof beyond a reasonable doubt and directly conflicts with the Fifth Circuit.

The Petitioner was denied his right to effective assistance of counsel, and his right to cross-examine and confront his accusers, and to call witnesses.

United States v. Chadwick, supra, rendered after the instant decision, holds a search of the type upheld by the Ninth Circuit is unconstitutional.

The intentional denial of the right to poll the jury, to be present, or to have a record, and the communication with, and excuse of, a juror, denied the constitutional right to a jury trial and due process.

Accordingly, this Court should grant the Petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in these proceedings, and should reverse both the Ninth Circuit and the District Court.

DATED at Anchorage, Alaska, this 12th day of September, 1977.

PHILLIP P. WEIDNER
Attorney for Petitioner,
GEORGE H. LUSTIG
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Anchorage, Alaska 99501

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that pursuant to Rule 21(1), Rule 33(1), Rule 33(2)(1), and Rule 33(3)(b), of the Supreme Court Rules of Appellate Procedure, that I am a member of the Bar of the U.S. Supreme Court in good standing, and that three copies of the foregoing Petition for A Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit were served upon counsel for the Respondent, by depositing the same in the United States mail at Anchorage, Alaska, postage pre-paid, addressed to:

Mr. G. Kent Edwards
U.S. Attorney
605 West Fourth Avenue
Anchorage, Alaska 99501

and further, that three copies of the foregoing Petition for A Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit was served upon the Solicitor General of the United States by depositing the same in the United States mail, at Anchorage, Alaska, postage pre-paid, addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530

and further, that three copies of the foregoing Petition for A Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit were served upon counsel for both co-defendants in the instant proceedings below, by depositing the same in the United States mail at Anchorage, Alaska, postage pre-paid, addressed to:

Mr. F. P. Pettyjohn
631 "I" Street
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Berkeley, California 94705
Attorney for Cheryl Rae Pederson

DATED at Anchorage, Alaska, this 12th day of September, 1977.

Phillip P. Weidner

PHILLIP P. WEIDNER
Attorney for Petitioner
George H. Lustig

APPENDIX A — OPINION OF THE NINTH CIRCUIT

IN NO. 76-2-661, U.S. V. LUSTIG, et al.

UNITED STATES of America,
Plaintiff-Appellee,

JUL 5

v.

George H. LUSTIG,
Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Gregory D. PEDERSON,
Defendant-Appellant.

Nos. 76–2661, 76–2752.

United States Court of Appeals,
Ninth Circuit.

June 15, 1977.

Defendants were convicted before the United States District Court for the District of Alaska, James A. von der Heydt, Chief Judge, of distribution of a controlled substance and conspiracy to distribute a controlled substance, with one defendant also being convicted of possession of a controlled substance, and they appealed. The Court of Appeals, James M. Carter, Circuit Judge, held that: (1) denial of continuance, which was requested by newly obtained counsel some four days prior to trial, was not abuse of discretion; (2) in camera excu-

sal of juror and his replacement with approved alternate was not prejudicial; (3) probable cause was not required for postarrest inventory search of defendant's truck; (4) neither the "anti-marital facts" privilege nor the "confidential marital communications" privilege barred admission of testimony of defendant's former common-law wife as to her observations of defendant's engaging in drug transactions with third parties and (5) district court did not erroneously curtail cross-examination of informant.

Judgments affirmed.

1. Criminal Law ⇐641.12(1)

Failure to grant continuance, which was sought some four days prior to trial, did not deprive defendant of effective assistance of counsel since although defendant did not obtain substitute counsel until day of motion, defendant had over a month after original counsel's motion to withdraw within which to obtain new counsel and it was unlikely that defendant would be unable to find willing counsel, there were no prejudicial factors and record revealed extensive and competent argument and cross-examination by counsel in the relatively uncomplicated case; although it was arguable

whether new counsel should have been granted more time, there was no abuse of discretion.

2. Criminal Law ⇐586

Court-imposed freeze on defendant's assets could not be found to have prevented him from hiring new counsel, for purpose of determining whether denial of continuance sought by new counsel some four days prior to trial was abuse of discretion, since freeze was for limited purpose of insuring that defendant would not flee and freeze would not have prevented payment of an attorney if request had been made; in any event, defendant was of substantial means and new counsel immediately rented an office and hired a secretary, investigator, research assistant and another attorney to work on the case.

3. Criminal Law ⇐586

Trial court has wide discretion to grant or deny continuances.

4. Criminal Law ⇐593, 1168(8)

Actual prejudice must be shown before a trial court's denial of continuance will be reversed; moreover, a court must be wary against the "right of counsel" being used as a ploy to gain time or effect delay.

5. Criminal Law ⇐1138(2)

Court of Appeals may review the record to determine the adequacy of representation and possible prejudice from a denial of a continuance.

6. Criminal Law ⇐573

Speedy Trial Act allows 90 days from arrest within which to bring a defendant to trial; moreover, delays attributable to defendant are not counted. 18 U.S.C.A. § 3164.

7. Criminal Law ⇐649(2)

Denial of continuance to enable defendant to call witness to allegedly establish that defendant's common-law wife was motivated by revenge in testifying against him was not abuse of discretion since request came after defense rested its case and could not be said to be a product of anything except lack of due diligence; moreover, testimony would have been cumulative and marginally relevant.

8. Jury ⇐133

A judge may dismiss a juror for cause without a hearing; likewise, the court is not required to hold hearings on questions of fitness; in camera inquiries are sufficient.

9. Criminal Law ⇐1163(2)

Reviewing courts will not presume

prejudice where the trial judge removes a juror.

10. Criminal Law ⇐636(1)

Failure to hold hearing prior to dismissing juror who, under oath, revealed that he possessed information about the case which made him believe that defendants were guilty did not violate defendant's right to be present at all critical stages of a proceeding especially since excused juror was replaced with an alternate, who had previously been approved by defendants; to have retained the juror would have been prejudicial.

11. Criminal Law ⇐1166.16

Objection that excusal of a venireman who failed to take the oath prior to voir dire was prejudicial error, apparently because of some vague religious grounds, was frivolous; there was no indication that the venireman's failure to take the oath had anything to do with religious grounds and, in any event, the excusal did not violate defendant's rights.

12. Criminal Law ⇐874

Where on being polled as to whether a true verdict had been announced each juror answered in the affirmative, trial court did not abuse its discretion in refusing defendant's request to poll the

jury as to each of the four counts since such procedure would have been needlessly repetitious; however, defendant would have had a valid objection had one or more jurors expressed some uncertainty as to the verdict.

13. Criminal Law ⇐874

Jury polling is a matter for the discretion of the court.

14. Criminal Law ⇐875(1)

Trial court, in drug prosecution, was not required to use jury form in which there was a place for each juror to sign after each count of the indictment; in fact, forms do not even have to be used and, where they are, any reasonable form will suffice. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 404, 406, 21 U.S.C.A. §§ 841(a)(1), 844, 846.

15. Criminal Law ⇐956(1), 957(1)

Where no dissent or uncertainty is demonstrated in court, testimony will not be received from jurors or others regarding the verdict itself.

16. Criminal Law ⇐956(1)

Defendant could not be heard to attack verdict on ground that after verdict was received a juror had repudiated it, especially where party who allegedly overheard the repudiation was not re-

vealed and record did not reveal any uncertainty or disagreement with the verdict by any juror.

17. Drugs and Narcotics ⇐183

A "seal-a-meal" bagging machine and unused "seal-a-meal" bags and drug-weighing scales obtained on inventory search of contents of defendant's truck prior to its impounding following his arrest were properly seized and used as evidence in drug prosecution; probable cause for such search was not required. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 404, 406, 21 U.S.C.A. §§ 841(a)(1), 844, 846.

18. Searches and Seizures ⇐3.8(1)

Search warrant for defendant's house was not invalid on ground that it did not contain sufficient information to be a "night time warrant" where search occurred at 9 PM, an hour before the "night time" requirement begins; moreover, government did not introduce any fruits of such search during its case in chief.

19. Constitutional Law ⇐82

Use of defendant's telephone records as evidence in drug prosecution did not violate his right to privacy since the "expectation of privacy" only extends to the

content of telephone conversations and not to records that conversations took place. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 404, 406, 21 U.S.C.A. §§ 841(a)(1), 844, 846.

20. Witnesses ⇐54, 188(1)

Federal courts recognize two distinct privileges arising out of the marital relationship; the first, referred to as the "anti-marital facts" privilege, bars one spouse from testifying against the other and permits either spouse, on objection, to exclude adverse testimony by the other; the second privilege protects "confidential marital communications" and bars testimony concerning interspousal, confidential expressions arising from the marital relationship. Federal Rules of Evidence, rule 501, 28 U.S.C.A.; Fed. Rules Crim.Proc. rule 26, 18 U.S.C.A.

21. Witnesses ⇐64(1), 195

The "anti-marital facts" privilege is what remains of the old common-law rule that a spouse was incompetent as a witness for or against the other spouse based on the legal fiction that the husband and wife were one person; hence, such privilege does not survive the termination of the marriage; however, the "confidential marital communications" privilege survives termination of the

marriage. Federal Rules of Evidence, rule 501, 28 U.S.C.A.; Fed.Rules Crim. Proc. rule 26, 18 U.S.C.A.

22. Witnesses ⇐63, 189

Neither "anti-marital facts" privilege nor "confidential marital communications" privilege prevents introduction of testimony of defendant's common-law wife as to defendant's drug dealings since both privileges depend on existence of a valid marriage, as determined by state law and, under Alaska law, common-law marriage is not valid. Federal Rules of Evidence, rule 501, 28 U.S.C.A.; Fed.Rules Crim.Proc. rule 26, 18 U.S. C.A.; AS 25.05.011, 261, 311.

23. Witnesses ⇐63, 189

Even if equal protection requires that marital privileges be extended to ceremonial as well as common-law marriages, regardless of whether common-law marriages are recognized by state law, such proposition would not have aided defendant, complaining of admission of testimony of common-law wife, since as to the "anti-marital facts" privilege the record revealed that marital relationship had been terminated with no chance of reconciliation and the "confidential marital communications" privilege would have been equally unavailing since "wife's" testimony concerned matters neither communicative nor confidential, in that most of her testimony related to observations of defendant's engaging in drug transactions with third parties. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 404, 406, 21 U.S.C.A. §§ 841(a)(1), 844, 846; Federal Rules of Evidence, rule 501, 28 U.S.C.A.; Fed. Rules Crim.Proc. rule 26, 18 U.S.C.A.; AS 25.05.011, 261, 311.

24. Witnesses ⇐191, 193

The "confidential marital communications" privilege applies only to utterances or expressions intended by one spouse to convey a message to another; even if one spouse's acts are held to constitute "communications" the privilege is not extended to communications made to or in presence of third parties since they are not intended to be confidential. Federal Rules of Evidence, rule 501, 28 U.S.C.A.; Fed.Rules Crim.Proc. rule 26, 18 U.S.C.A.

25. Witnesses ⇐191

Acts do not become privileged communications, for purpose of the marital communications privileges, simply by being done in the presence of a spouse. Federal Rules of Evidence, rule 501, 28 U.S.C.A.; Fed.Rules Crim.Proc. rule 26, 18 U.S.C.A.

26. Criminal Law ⇐663(4)

Even if testimony of defendant's common-law wife violated sequestration order, receipt of such testimony was a matter falling within the trial court's discretion.

27. Witnesses ⇐331½

Extent of impeachment is committed to the trial court's discretion; such court must determine whether the probative value of the evidence is outweighed by the danger of confusion, prejudice, or waste of time; trial court's determination will not be reversed absent a showing of abuse. Federal Rules of Evidence, rules 403, 608(b), 28 U.S.C.A.

28. Witnesses ⇐372(2)

Alleged curtailment of defense counsel's cross-examination of informant regarding his possible involvement in several criminal activities was not abuse of discretion since counsel was able to make a broad inquiry into informant's credibility and possible bias and, among other things, inquired as to his agreement with the police and whether he had received any termination of probation or parole as a result of his testimony and as to whether he had lied in other proceedings. Federal Rules of Evidence, rules 403, 608(b), 28 U.S.C.A.

29. Witnesses ⇐270(1)

Where defense counsel often strayed from relevancy in his exhaustive cross-examination of police officers, it was not error for the trial court to lead him back to it. Federal Rules of Evidence, rules 403, 608(b), 28 U.S.C.A.

30. Criminal Law ⇐339.7(1)

The 30 seconds to one minute in which undercover detective viewed individual from whom his immediate seller obtained drugs was not inadequate for later identification from pretrial photographic display, which occurred two hours after cocaine sale, since the detective was a good witness in terms of his likely ability to observe and remember the scene and his identification was verified by that of three other persons who saw defendant for longer periods; furthermore, there also was substantial corroborative evidence supporting conviction. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 404, 406, 21 U.S.C.A. §§ 841(a)(1), 844, 846.

31. Criminal Law ⇐412(5)

Evidence of defendant's statement, "You are not going to pin that on me," which statement was made after police discovered a bag of cocaine in the police car near defendant after his arrest, was

admissible for purpose of showing that defendant knew the bag contained cocaine where defendant was advised of his rights immediately on arrest and statement was made several minutes thereafter; likewise, various statements made by defendant at time of booking were also admissible. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 404, 406, 21 U.S.C.A. §§ 841(a)(1), 844, 846.

32. Witnesses ⇐301

Codefendant, who took stand to advance defense of entrapment, was not denied right against self-incrimination because he was compelled to tell from whom he had obtained the drugs, on theory that since he failed to identify defendant as his source and defendant was nevertheless convicted the codefendant had lost his credibility and was thereby incriminated, where prior to cross-examination counsel for defendant has asked codefendant about any meetings or dealings between the two; hence, line of inquiry had been opened and government was merely pursuing it and, furthermore, evidence of conspiratorial activity would refute entrapment defense. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 404, 406, 21 U.S.C.A. §§ 841(a)(1), 844, 846.

33. Witnesses ⇐277(4)

A defendant has no right to give testimony without laying himself open to cross-examination on that testimony.

34. Drugs and Narcotics ⇐104

Failure to republish schedules listing cocaine as a controlled substance was not fatal to drug indictment. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 404, 406, 21 U.S.C.A. §§ 841(a)(1), 844, 846.

35. Drugs and Narcotics ⇐108

Trial court, in drug prosecution, did not err in refusing to hear evidence about the pharmacological nature of cocaine; since defendant presented detailed motions to the court discussing the nature of cocaine it would have been a waste of time to hear extensive testimony on such marginal issue. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 404, 406, 21 U.S.C.A. §§ 841(a)(1), 844, 846.

36. Drugs and Narcotics ⇐46

Cocaine is not improperly classified as a controlled substance on ground that it is relatively harmless. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 404, 406, 21 U.S.C.A. §§ 841(a)(1), 844, 846.

37. Criminal Law ⇦700
Federal Courts ⇦404

Conviction was not required to be overturned on ground that prosecutors improperly "forum-shopped" for the best court in which to obtain drug conviction, notwithstanding cooperation between state and federal officers, since a federal warrant was obtained for defendant's arrest and he never was indicted by the state; furthermore, when in federal courts, federal law and procedures apply and, hence, state law was not relevant. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 404, 406, 21 U.S.C.A. §§ 841(a)(1), 844, 846.

38. Conspiracy ⇦47(1), 48.2(1)

Once existence of a conspiracy is established, only slight evidence is required to connect any defendant with it; hence, instruction that very little evidence is necessary to show that a particular defendant was part of the conspiracy was a correct statement of the law. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

39. Criminal Law ⇦775(2)

Requested alibi instruction was properly refused where none of the evidence revealed any alibi; had such instruction been given it would have been merely misleading and, in any event, even if defendant presented evidence of an alibi, it would not have rebutted the Government's evidence since presence need not be shown to prove conspiracy and evidence of extensive telephone calls between codefendants would have been sufficient. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

40. Criminal Law ⇦826

Under Rules of District Court for the District of Alaska, defendant's requested instructions were untimely where filed the very day that instructions were given; even if trial court erred in refusing to give requested instructions, the error would have been excusable in light of the tardiness. U.S. Dist.Ct.Rules Alaska, General Rule 15.

41. Criminal Law ⇦986

Whether trial judge considered defendant's allegedly perjured testimony in sentencing was irrelevant to validity of sentence imposed since a judge may consider the candor of the defendant on the stand in passing sentence.

42. Criminal Law ⇦1147

Court of Appeals will not review a sentence absent some extraordinary circumstance.

43. Criminal Law ⇐655(5), 1166.22(3)

Since jury had retired from courtroom when trial judge allegedly improperly commented that he found counsel's questions to be "marginally relevant" no prejudice was possible; in any event, trial judge is vested with power to comment fairly to the jury.

Appeal from the United States District Court for the District of Alaska.

Before CARTER, TRASK and KENNEDY, Circuit Judges.

JAMES M. CARTER, Circuit Judge:

This is an appeal from jury convictions for distribution of a controlled substance (cocaine), in violation of 21 U.S.C. § 841(a)(1), and conspiracy to distribute a controlled substance, in violation of 21 U.S.C. § 846. Appellant Pederson was also convicted of possession of a controlled substance, in violation of 21 U.S.C. § 844.

Appellant Lustig has raised numerous contentions. In particular, he argues that the judge improperly dismissed a juror, that he should have been granted a continuance after he obtained new counsel, and that the testimony of his common law wife was received in violation of the marital privilege. Appellant

Pederson argues only that his right against self-incrimination was violated by being forced to answer certain questions on cross-examination.[1] Finding none of these claims meritorious, we affirm.

FACTS

Appellant Pederson met undercover police detective Bernard Lau on February 27, 1976, in order to sell him an ounce of cocaine. The meeting was arranged by Mike Tarnef, a local dealer turned informant. Prior to this meeting, Pederson picked up a small package (presumably containing the cocaine) from a man identified by four police officers as appellant Lustig. Pederson told Tarnef that his "man", or narcotics source, was Lustig.

After the February 27 meeting, Pederson told Lau that more drugs were available for purchase. Pederson telephoned Lustig immediately after this conversation. (Telephone records indicate extensive communications between Pederson and Lustig.) Lau gave Pederson and his wife (and co-defendant) Sherri Pederson some money the next day to buy the

1. Appellant Pederson does, however, adopt the arguments of Lustig on appeal, as is his right under Fed.R.App.P. 28(i).

drugs and to repay a debt Pederson said he had with his source. It was established that Pederson owed money to Lustig.

Prior to the second meeting with Lau, the Pedersons drove out to Lustig's home located in Wasilla. Their vehicle rendezvoused with another near Lustig's home and then returned to Anchorage. The Pedersons then went directly to the meeting with Lau and sold him another ounce of cocaine.

Appellants were arrested on March 11. Lustig was stopped near his home while driving a truck. It was searched for inventory purposes, and a "seal-a-meal" bagging machine later identified as the same used for packaging the cocaine sold to Lau was found.[2] The truck also contained an unused "seal-a-meal" bag and drug-weighing scales.

Lustig was informed of his rights and placed in a police car. Enroute to the federal marshal, the arresting officers found two ounces of cocaine in Lustig's possession. Lustig had attempted to

2. Experts testified that the "seal-a-meal" bag was a unique packaging method for cocaine. Tests conducted on the device found in Lustig's truck showed that it left a characteristic marking on the bags it sealed identical to that on the bags sold to Lau and to a bag found in Lustig's possession on the day of his arrest.

conceal this cocaine under the rear seat of the car.

Appellants were indicted (in a superseding indictment) on March 24. Lustig initially was represented by attorney William Fuld, who handled the arraignment proceedings and filed numerous pretrial motions on Lustig's behalf. The district court, informed that Lustig might attempt to post bond and then flee, froze Lustig's assets and restrained Lustig from disposing of his assets. In the meantime, Lustig was rearrested on a prior Alaskan drug offense on a petition to revoke probation and held without bail.[3]

Lustig obtained new counsel four days before the scheduled trial date. The court had urged Lustig, a month earlier, to finalize arrangements with an attorney to insure proper representation. The new counsel made an unsuccessful

3. Lustig characterizes himself as a "political activist who has incurred the wrath of the United States government." He was convicted in 1968 for possession and distribution of marijuana. He was peripherally involved in the litigation which ended with the Alaska Supreme Court declaring that possession of marijuana for personal use was constitutionally protected. *See Ravin v. State*, 537 P.2d 494 (Alas.1975). However, Lustig neither specifically argues nor makes out a claim of official harassment.

motion for a continuance, and then petitioned this court for a writ of mandamus or prohibition staying the trial in order to provide more preparation time. This petition was denied on April 26, 1976.

Trial began on April 27. After one day of testimony, the court informed counsel that one juror had been excused because he admitted prejudicial knowledge about the case. A motion for mistrial because of this excusal was denied.

Lustig testified in his own behalf. He said he felt it was an infringement on his liberty for the government to proscribe the use of cocaine. He admitted to possession of the drug, but said it was for his own use. He denied that the sealing machine and other paraphernalia belonged to him. Lustig also claimed that the police were mistaken in their identification of him as the supplier of the drugs to Pederson.

Pederson also testified in his own behalf. He admitted participating in the February 25 and March 4 transactions, but claimed entrapment. He denied that Lustig was the man who supplied him with the cocaine.

The government called Lustig's common law wife, Callie Newton, as a rebuttal witness. She testified there was a verbal agreement between Lustig and

Pederson to distribute cocaine. Lustig objected on the ground that this testimony violated his marital privilege. The district court allowed the testimony because Alaska law does not recognize the validity of common law marriage. Lustig claims that Newton's testimony was given because of a desire for revenge arising out of certain unrelated events. The defense sought a continuance during trial to subpoena an independent witness to establish Newton's improper motives. This request was denied.

After 12 hours of deliberations, the jury returned verdicts of guilty on all counts. Motions by Lustig for different verdict forms and for individual polling of jury members on each count were denied. Lustig was sentenced to nine years; Pederson received seven. This appeal followed.[4]

MOTIONS FOR CONTINUANCES

[1–7] Lustig was represented by at-

4. After Lustig was convicted and sentenced in this case, his probation was revoked for the prior Alaska offense and his original five-year sentence reinstated. Lustig's appeal in this other case is dealt with in a companion case filed in conjunction with this opinion. *See United States v. Lustig*, slip opin. 1277, —— F.2d —— (9 Cir. 1977).

torney Fuld from the time of his arrest until four days prior to trial. Fuld moved to withdraw as counsel two weeks after Lustig's arrest, claiming the period prescribed by the Speedy Trial Act made representation by anyone impossible. The district court denied Fuld's motion, but warned Lustig that he must either make final arrangements with Fuld or get another attorney for trial, then more than a month away. Lustig did not act on this advice until immediately before trial.

At that time, attorney Weidner became counsel of record. He asked for a continuance four days prior to trial. The court denied this motion. Lustig now claims that this failure to grant a continuance resulted in a deprivation of his right to the effective assistance of counsel of his choice. *See, e. g., Powell v. Alabama*, 287 U.S. 45, 67, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *Sanders v. Russell*, 401 F.2d 241, 247 (5 Cir. 1968).

Lustig had over a month to obtain a different attorney. He is a man of considerable means.[5] It is very unlikely that he would be unable to find willing counsel in the entire city of Anchorage (which has over 600 attorneys). More probably, he simply did not try very hard. *See Glenn v. United States*, 303

F.2d 536, 543 (5 Cir. 1962) (failure to obtain counsel was defendant's fault).

Lustig relies primarily on *Mardian v. United States*, 178 U.S.App.D.C. ——, 546 F.2d 973 (1977). In that case, the appellant had made a motion for severance two weeks into trial after his attorney unexpectedly became ill and was hospitalized. The circuit court found the denial of this motion to be reversible error, but only because appellant had earlier made a showing to the trial court of substantial prejudice resulting from a joint trial. There was a great disparity in the evidence against the appellant and his three co-defendants. *Id.* at 979–80.

These factors are absent here. The trial had not begun; Lustig had had ample time to obtain alternative counsel.

5. Lustig claims that the court-imposed freeze over his assets prevented him from hiring counsel. The court's order was for the limited purpose of insuring that Lustig did not flee. It would not have prevented payment of an attorney if a request had been made. Furthermore, Lustig's present counsel actually terminated his employment with the Anchorage Public Defenders' Office to become Lustig's attorney. One can only infer that some attractive consideration prompted this action. In addition, the attorney immediately rented an office, and hired a secretary, an investigator, a research assistant, and another attorney to work on the case. This hardly suggests either inadequate resources or representation.

There were no prejudicial factors involved such as the disparity in evidence. As the court in *Mardian* also observed, "[A] defendant's right to an attorney of his choice is not so absolute as to permit disruption of the fair and orderly administration of justice when another competent attorney is available to continue the defense." *Id.* at 979, n. 9. *See also Lofton v. Procunier*, 487 F.2d 434, 435 (9 Cir. 1973).

A trial court has wide discretion to grant or deny continuances. *Ungar v. Sarafite*, 376 U.S. 575, 591, 84 S.Ct. 841, 11 L.Ed.2d 921 (1963). Actual prejudice must be shown before a trial court's denial of a continuance will be reversed. *United States v. Harris*, 501 F.2d 1, 4–5 (9 Cir. 1974); *Daut v. United States*, 405 F.2d 312, 315 (9 Cir. 1968), *cert. denied*, 402 U.S. 945, 91 S.Ct. 1624, 29 L.Ed.2d 114 (1971). Moreover, a court must be wary against the "right of counsel" being used as a ploy to gain time or effect delay. *United States ex rel. Baskerville v. Deegan*, 428 F.2d 714, 716 (2 Cir. 1970).

This court may view the record to determine the adequacy of representation and possible prejudice from a denial of a continuance. *See United States v. Simmons*, 457 F.2d 763, 764 (9 Cir. 1972); *Torres v. United States*, 270 F.2d 252.

255 (9 Cir. 1959). And the record in this case reveals extensive and competent argument and cross-examination by Lustig's counsel—far more so, we might add, than for his co-defendant. Moreover, this case was relatively uncomplicated, with the government producing its evidence in just six hours.

It is arguable whether the district court should have granted Lustig's new attorney more time.[6] However, the failure to do so falls well short of an abuse of discretion.[7]

6. The record shows that the trial judge mistakenly believed he had no choice in the matter; he thought the Speedy Trial Act, 18 U.S.C. § 3164, rigidly required trial within 46 days after arrest. Ninety days from arrest to trial is allowed. Moreover, delays which are attributable to the defendant are not counted in this period. *United States v. Lemon*, 550 F.2d 467, 470 (9 Cir. 1977).

7. Lustig also argues that the court should have granted a continuance to enable him to call the witness who would establish that Newton was motivated by revenge. This request came after the defense rested its case, and thus cannot be said to be a product of anything except lack of due diligence. *See United States v. Harris*, 436 F.2d 775 (9 Cir. 1970). Moreover, the testimony would have been cumulative and marginally relevant. There was no error here either.

JUROR DISCHARGE

[8–11] Prior to the start of the second day of trial, Judge von der Heydt met with juror David Gransbury at Gransbury's request. Gransbury revealed that he possessed information about the case which made him believe that appellants were guilty. The judge examined Gransbury under oath, in chambers outside presence of counsel, and finally excused him from further duty. The first alternate was seated in his place in view of the defendants, pursuant to Fed.R.Crim.P. 24(c). Lustig's motion for an evidentiary hearing was denied.

Lustig argues that this excusal violated his right to be present at all critical stages of a proceeding. *See* Fed.R. Crim.P. 43. He cites numerous cases which point to the importance of the court not communicating ex parte with the jury. *See, e. g., United States v. Arrigada,* 451 F.2d 487, 488 (4 Cir. 1971); *Evans v. United States,* 284 F.2d 393 (6 Cir. 1960). Had juror Gransbury been retained, these cases might be applicable.[8]

It is well established that a judge may dismiss a juror for cause without a hearing. *See, e. g., United States v. Domenach,* 476 F.2d 1229, 1232 (2 Cir.), *cert. denied,* 414 U.S. 480, 94 S.Ct. 95, 38 L.Ed.2d 77 (1973) (dismissal of juror who was 10 minutes late); *United States v. Cameron,* 464 F.2d 333, 335 (7 Cir. 1972) (judge has discretion to remove juror who cannot perform duties). The court is not required to hold hearings on questions of fitness either; *in camera* inquiries are sufficient. *United States v. Crisona,* 416 F.2d 107, 119 (2 Cir. 1969).

This case is similar to *United States v. Houlihan,* 332 F.2d 8 (2 Cir.), *cert. denied,* 379 U.S. 828, 85 S.Ct. 56, 13 L.Ed.2d 37 (1964). There one of the jurors was a practical nurse employed by a heart patient who suffered a heart attack on the eighth day of trial. The juror informed the judge of these facts in his chambers without anyone else present. The judge excused the juror and later informed counsel of his action. Defendant argued on appeal that this

8. Appellant also contends that the excusal represented an improper ex parte communication of the court to the jury. But such a communication is necessarily implied by the judge's excusal (it would be difficult to excuse without communicating), and would not be prejudicial in any case because that juror no longer served. Moreover, communications by the judge far more prejudicial and less justified than this one have been found to be harmless error. *See, e. g., United States v. Goodman,* 457 F.2d 68 (9 Cir. 1972) (note from judge).

violated his Fifth and Sixth Amendment rights. The Second Circuit responded:

> "We conclude that defendants' rights were not violated. This circuit has previously held that it was not improper near the end of a trial for a judge to speak privately and off the record to a juror to convince him to remain on the jury after he had requested to be excused for reasons of personal hardship. *United States v. Woodner,* 317 F.2d 649, 652 (2d Cir.), *cert. denied,* 375 U.S. 903, 84 S.Ct. 192, 11 L.Ed.2d 144 (1963). As we said
>
> > 'we would hesitate to presume that prejudice resulted in the absence of some plain showing to that effect. * * * We have enough confidence in the integrity and fairness of the District Judges to assume that they will not make unfair remarks to jurors while undertaking administrative duties of this nature.'
>
> Certainly no greater prejudice can arise when as a result of the interview the juror is dismissed and, in the presence of the defendant and his attorney, an alternate is substituted. The *Woodner* decision is therefore controlling." 332 F.2d at 13 (citations omitted).

See also United States v. Zambito, 315 F.2d 266, 269 (9 Cir.), *cert. denied,* 373 U.S. 924, 83 S.Ct. 1524, 10 L.Ed.2d 423 (1963) (judge permitted to dismiss juror after disclosure in chambers of untruthful voir dire response).

Courts will not presume prejudice where the judge removes a juror. *United States v. Ellenbogen,* 365 F.2d 982, 989 (2 Cir.), *cert. denied,* 386 U.S. 923, 87 S.Ct. 892, 17 L.Ed.2d 795 (1966). Most of the cases cited by Lustig in which prejudice was found are ones in which the jury was retained, not excused. It is difficult to see what prejudice could result from placing an alternate juror, approved by the defendants, on the jury in place of a juror who cannot fairly perform his duties. The opposite would have been prejudicial.[9]

JURY POLL

[12, 13] After the verdict was announced, each juror was asked whether a

9. Lustig also contends that the excusal of a venireman who failed to take the oath prior to voir dire was prejudicial error. He bases this complaint on some vague religious grounds. This objection is frivolous. There is no indication that the venireman's failure to take the oath had anything to do with religious grounds. And even if it did, the excusal would not violate defendant's rights. *See Grech v. Wainwright,* 492 F.2d 747, 749 (5 Cir. 1974); *United States v. Dangler,* 422 F.2d 344, 345 (5 Cir. 1970).

true verdict had been announced. Each juror answered in the affirmative. Nonetheless, Lustig requested that the jury be polled as to each of the four counts, and now asserts that it was reversible error not to use this procedure. We disagree. To follow the procedure he now advocates would be needlessly repetitious.

Lustig would have a valid objection if one or more jury members expressed some uncertainty as to the verdict. *See, e. g., United States v. Edwards,* 469 F.2d 1362 (5 Cir. 1972). There was no uncertainty expressed here. Since jury polling is a matter of discretion for the court, *Shibley v. United States,* 237 F.2d 327, 334 (9 Cir.), *cert. denied,* 352 U.S. 873, 77 S.Ct. 94, 1 L.Ed.2d 77 (1956), there was no abuse of discretion in this case.

[14] Lustig also contends that the jury forms used were incomplete and erroneous. He wanted the court to use a form in which there was a place for each juror to sign after each count of the indictment. But he cites no authority for such a requirement other than one case in which such a form was used. *See Posey v. United States,* 416 F.2d 545, 553 (5 Cir. 1969). In fact, forms do not even have to be used. When they are,

any reasonable form will suffice. *See* 23A C.J.S. Criminal Law §§ 1393–95.

[15, 16] After the verdict was received, Lustig's counsel filed an affidavit alleging that a juror had repudiated the verdict. This affidavit purported to contain a statement of a juror given to a friend and then overheard by the affiant. The party who allegedly heard this statement is not revealed. The record does not reveal any uncertainty about or disagreement with the verdict by any juror.

Where no dissent or uncertainty is demonstrated in court, testimony will not be received from jurors or others regarding the verdict itself. *Stein v. New York,* 346 U.S. 156, 178, 73 S.Ct. 1077, 97 L.Ed. 1522 (1952); *Hyde v. United States,* 225 U.S. 347, 382–84, 32 S.Ct. 792, 56 L.Ed. 1114 (1911); *United States v. Stacey,* 475 F.2d 1119, 1121 (9 Cir. 1973). Lustig has shown no reason to vary from this general rule. Therefore, the argument is foreclosed.

SEARCH AND SEIZURE

[17] After Lustig was arrested, his vehicle was searched to make an inventory of its contents prior to impounding. This was done according to standard police procedure. *See* 13 A.A.C. § 02.375. During this inventory, the sealing ma-

chine and bags were found. These items were properly seized and used as evidence. *See South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976) (inventory searches and seizures valid). Probable cause was not required.

[18, 19] Lustig argues that the search warrant for his house was invalid because it did not contain sufficient information to be a "night time warrant". However, the search occurred at 9:00 P.M., an hour before the "night time" requirement begins. *See United States v. Woodring*, 444 F.2d 749, 751 (9 Cir. 1971). Moreover, the government did not introduce any fruits of that search during its case in chief.[10]

TESTIMONY OF COMMON LAW WIFE

[20–26] Lustig argues that the testi-

10. Lustig also claims that the use of his telephone records as evidence violated his right to privacy. It is well established that the "expectation of privacy" only extends to the content of telephone conversations, not to records that conversations took place. *United States v. Baxter*, 492 F.2d 150, 167 (9 Cir. 1973). *See also United States v. Miller*, 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976) (subpoena to bank custodian for checking accounts does not violate rights of defendant).

mony of Callie Newton, his common law wife of seven years, was received in violation of the privilege for marital communications.[11] This claim is governed by Rule 501 of the Federal Rules of Evidence, which provides in relevant part:

> "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience."

See also Fed.R.Crim.P. 26, *as amended* (1972). We therefore turn to federal common law to decide Lustig's claim.

Federal courts recognize two distinct privileges arising out of the marital relationship. The first bars one spouse from testifying against the other. This privilege permits either spouse, upon objection, to exclude adverse testimony by the other. It is what remains of the old

11. We assume the existence of a marriage in accordance with common law principles. Lustig and Newton lived together for many years, had two children, and held themselves out to be husband and wife.

common law rule that a spouse was incompetent as a witness for or against the other spouse based on the legal fiction that husband and wife were one person. *See Hawkins v. United States,* 358 U.S. 74, 75–76, 79 S.Ct. 136, 3 L.Ed.2d 125 (1958); *Bisno v. United States,* 299 F.2d 711, 721 (9 Cir.), *cert. denied,* 370 U.S. 952, 82 S.Ct. 1602, 8 L.Ed.2d 818 (1962). This is often referred to as the "anti-marital facts" privilege. *See, e. g., United States v. Smith,* 533 F.2d 1077, 1079 (8 Cir. 1976). *See generally* C. Wright, 2 Federal Practice and Procedure § 405, at 83–86 (1969).

The other privilege protects confidential marital communications. It bars testimony concerning intra-spousal, confidential expressions arising from the marital relationship. *See Blau v. United States,* 340 U.S. 332, 333, 71 S.Ct. 301, 95 L.Ed. 306 (1951); *United States v. Harper,* 450 F.2d 1032, 1045 (5 Cir. 1971). Unlike the "anti-marital facts" privilege, this privilege survives the termination of the marriage. *Pereira v. United States,* 347 U.S. 1, 6, 74 S.Ct. 358, 98 L.Ed. 435 (1954); *United States v. Lewis,* 140 U.S. App.D.C. 40, 433 F.2d 1146, 1150 (1970).

Neither privilege prevents the introduction of Newton's testimony. Both privileges depend on the existence of a

valid marriage, as determined by state law. *United States v. Apodaca,* 522 F.2d 568, 571 (10 Cir. 1975); *United States v. Neeley,* 475 F.2d 1136, 1137 (4 Cir. 1973); J. Wigmore, Evidence § 2230 (McNaughton ed. 1961). Common law marriage is not valid under Alaska law. A.S. 25.05.-011, 261, 311. Therefore, neither privilege applies in this case. *See, e. g., United States v. Boatwright,* 446 F.2d 913, 915 (5 Cir. 1971); *United States v. McElrath,* 377 F.2d 508, 510 (6 Cir. 1967).

Lustig argues, however, that the concept of equal protection compels this court to go beyond existing law and recognize that those married under the common law also are entitled to the marital privileges in federal court.[12] Even if we were to agree with this proposition, however, it would not aid Lustig's cause. The "anti-marital facts" privilege does not survive the termination of the marriage. *United States v. Smith, supra,* 533 F.2d at 1079; *United States v. Fish-*

12. Lustig bases his argument on the recognition of marriage as a fundamental right to which the equal protection clause extends. *See, e. g., Boddie v. Connecticut,* 401 U.S. 371, 376, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); *Skinner v. Oklahoma,* 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). He contends those married under the common law therefore deserve equal treatment under federal evidentiary standards as those married by statute.

er, 518 F.2d 836, 838 (2 Cir.), *cert. denied,* 423 U.S. 1033, 96 S.Ct. 565, 46 L.Ed.2d 407 (1972). The record reveals that the Lustig-Newton relationship had been terminated with no chance of reconciliation. The "anti-marital facts" privilege, even if it were held to apply, therefore would not operate.

The confidential marital communications privilege would be equally unhelpful because Newton's testimony concerned matters neither communicative nor confidential in nature. It is well established that the privilege applies only to utterances or expressions intended by one spouse to convey a message to the other. *Pereira v. United States, supra,* 347 U.S. at 6, 74 S.Ct. 358; *United States v. Smith, supra,* 533 F.2d at 1079. Most of Newton's testimony related her observations of Lustig engaging in drug transactions with third parties. These are not communications. *See, e. g., Wolfle v. United States,* 291 U.S. 7, 16–17, 54 S.Ct. 279, 78 L.Ed. 617 (1934); *United States v. Lewis, supra,* 433 F.2d at 1150–51.

Lustig argues that his acts should nonetheless be considered communicative. The privilege has not been extended this far. *See* C. McCormick, Evidence § 79, at 164 (2d ed. 1972). But even if it

were, the "communications" were not confidential. Communications made to or in the presence of third parties are not intended to be confidential and are not privileged. *Pereira v. United States, supra,* 347 U.S. at 6–7, 74 S.Ct. 358; *United States v. Burks,* 152 U.S.App.D.C. 284, 470 F.2d 432, 434 (1972).[13]

Accordingly, neither marital privilege would bar Newton's testimony even if it were applicable to the Lustig-Newton common law marriage. We therefore need not reach Lustig's equal protection argument to decide this issue. There was no error in admitting Newton's testimony.[14]

CROSS-EXAMINATION

[27, 28] Lustig argues that the district court erroneously curtailed his

13. Acts do not become privileged communications simply by being done in the presence of a spouse.

14. Lustig also contends that the testimony of Newton violated the court's sequestration order. But Lustig fails to cite any portions of testimony in support of this contention or to explain how the order was violated. Moreover, the district court had discretion to receive this testimony in any event. *See Holder v. United States,* 150 U.S. 91, 92, 14 S.Ct. 10, 37 L.Ed. 90 (1893); *United States v. Cozzetti,* 441 F.2d 344, 349–50 (9 Cir. 1971).

cross-examination of the informant Tarnef. He sought to examine Tarnef regarding his possible involvement in several criminal activities. He also wanted to inquire whether Tarnef had charges pending against him. Such inquiries would have been for the sole purpose of attacking Tarnef's credibility.

The extent of impeachment is committed to the discretion of the trial court. Fed.R.Evid. 608(b). The court must determine whether the probative value of the evidence is outweighed by the danger of confusion, prejudice, or waste of time. Fed.R.Evid. 403. The court's determination will not be reversed without a showing of an abuse of discretion. *United States v. Phillips,* 482 F.2d 1355, 1357 (9 Cir. 1973); *United States v. Haili,* 443 F.2d 1295, 1299 (9 Cir. 1971).

Here Lustig was able to make a broad inquiry into the witness' credibility and possible bias. He asked Tarnef about his agreement with Anchorage police and whether he had received any termination of probation or parole as a result of his testimony. He also asked about Tarnef's prior convictions, the nature of his heroin habit, and whether he had lied in other proceedings. In short, there was ample cross-examination permitted on this collateral matter. *See United States v. Allende,* 486 F.2d 1351, 1354 (9

Cir. 1973), *cert. denied,* 416 U.S. 958, 94 S.Ct. 1973, 40 L.Ed.2d 308 (1974); *United States v. Norman,* 402 F.2d 73, 77 (9 Cir. 1968); *Enciso v. United States,* 370 F.2d 749, 751 (9 Cir. 1967).

[29] Lustig also complains about the limitations placed on his cross-examination of officers Lau and Jones, and Callie Newton. Yet the record reveals that the court permitted examination into areas it did not have to. For example, Lau was asked whether he was being paid as a witness; Newton was asked why she had sued Lustig and whether she was involved in drug dealing. The record shows that Lustig's counsel often strayed from relevancy in his exhaustive questioning. It was not error for the court to lead him back to it.

PRETRIAL IDENTIFICATION

[30] Lustig argues that the pretrial photographic identification procedures used were impermissibly suggestive in violation of *Simmons v. United States,* 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). The officers were shown four or five photographs without name identification or suggestion as to which one was Lustig. This identification procedure occurred two hours after the cocaine sale. Both officers identified Lustig. Nothing in the procedure itself dis-

closes the suggestiveness disapproved by *Simmons*.

Lustig suggests that the 30 seconds to one minute which Detective Lau had to view the suspect was inadequate for later identification. But periods shorter than this have been deemed adequate. *See, e. g., United States v. Kimbrough,* 528 F.2d 1242, 1243–47 (7 Cir. 1976) (30 seconds); *United States ex rel. Pella v. Reid,* 527 F.2d 380, 385 (2 Cir. 1975) (10–15 seconds). Detective Lau obviously was a good witness in terms of his likely ability to observe and remember the scene. His identification was verified by that of three other persons who saw Lustig for longer periods. There also was substantial corroborative evidence supporting the conviction. *See United States v. Schoore,* 449 F.2d 348, 349 (9 Cir.), *cert. denied,* 405 U.S. 1018, 92 S.Ct. 1299, 31 L.Ed.2d 481 (1971); *United States v. Stinson,* 422 F.2d 356, 357 (9 Cir. 1969).

STATEMENT BY LUSTIG

[31] Lustig objects to the introduction into evidence of the statement "you are not going to pin that on me" made after police discovered a bag of cocaine in the police car near Lustig after his arrest. (This statement was admitted to show that Lustig knew that the bag contained cocaine.) The evidence shows that Lustig was advised of his rights immediately upon arrest. Lustig's statement was made several minutes after this time. Therefore, this evidence was admissible.[15]

CROSS–EXAMINATION OF PEDERSON

[32, 33] Pederson took the stand to advance his defense of entrapment. He now claims that he was denied his right against self-incrimination because he was compelled to tell from whom he had obtained the drugs. Since he failed to identify Lustig as his source, and yet Lustig was convicted, the argument goes, Pederson lost his credibility with the jury and thereby was incriminated.

Prior to the government's cross-examination, counsel for Lustig asked Pederson about any meetings or dealings between co-defendants. This line of inquiry was therefore opened before the government began its examination. The government was simply pursuing it. A defendant has no right to give testimony without laying himself open to cross-examination upon that testimony. *Brown*

15. So too were various statements made by Lustig at the time of booking.

v. *United States,* 356 U.S. 148, 155, 78 S.Ct. 622, 2 L.Ed.2d 589 (1957).

Since Pederson raised the defense of entrapment, the prosecution was permitted to conduct a "searching inquiry" into the possible predisposition of the defendant. *United States v. Russell,* 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 1046 (1973). This inquiry necessarily includes the defendant's knowledge of and connections with his co-defendant, since evidence of conspiratorial activity would refute a theory of entrapment. The government's cross-examination was proper.

COCAINE

[34] Lustig raises several familiar arguments regarding the controlled substance cocaine. He first argues that the failure to republish the schedules listing cocaine as a controlled substance is fatal to the indictment. This contention is disposed of by *United States v. Eddy,* 549 F.2d 108 (9 Cir. 1976) (no need for annual republication under statute).

[35] Lustig next argues that the trial court erred by not hearing evidence about the pharmacological nature of cocaine. *See United States v. Foss,* 501 F.2d 572 (1 Cir. 1974). The record shows, however, that Lustig presented

detailed motions to the court discussing the nature of cocaine. It would have been a waste of time for the court to hear extensive testimony on this marginal issue.

[36] Lustig finally argues that cocaine is improperly classified as a controlled substance, since it is relatively harmless. Beyond the fact that the evidence is sharply divided about cocaine, this court has recently rejected a similar contention regarding marijuana—a substance far less dangerous and controversial than cocaine. *See United States v. Rogers,* 549 F.2d 107 (9 Cir. 1976).

PROSECUTION IN FEDERAL COURT

[37] Lustig claims that prosecutors improperly "forum-shopped" for the best court in which to obtain a conviction against him. Of course, cooperation between state and federal officers often occurs, with prosecution through one court system or the other. When in federal court, federal law and procedures apply. Therefore, Alaska law is not relevant. *Elkins v. United States,* 364 U.S. 206, 224, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1959). A federal warrant was obtained for Lustig's arrest, who never was indicted by the state. Moreover, numerous cases have involved similar procedural

histories as this one and have been affirmed on appeal. *See, e. g., United States v. Harrington,* 504 F.2d 130 (7 Cir. 1974); *United States v. Sellers,* 483 F.2d 37 (5 Cir.), *cert. denied,* 417 U.S. 908, 94 S.Ct. 2604, 41 L.Ed.2d 212 (1973).

JURY INSTRUCTIONS

[38] Lustig complains about several jury instructions. First he argues that the conspiracy instruction informing the jury that "very little evidence is necessary to show that a particular defendant was part" of the conspiracy was erroneous. However, it is well established that once the existence of a conspiracy is established, only *slight* evidence is required to connect any defendant with it. *United States v. Freie,* 545 F.2d 1217, 1221 (9 Cir. 1976); *United States v. Westover,* 511 F.2d 1154, 1157 (9 Cir. 1975). Thus, the contested instruction correctly states the law.

[39] Lustig also requested an alibi instruction and claims that the failure to give it was error. None of the evidence shows any "alibi" and thus the court did not have to give what would have been a misleading instruction in this case. *See United States v. Dye,* 508 F.2d 1226, 1231 (6 Cir. 1974); *United States v. Cole,* 453 F.2d 902, 906 (8 Cir. 1972). However, even if Lustig had presented evidence of an alibi, it would not have rebutted the government's evidence. Presence need not be shown to prove conspiracy. *United States v. Lee,* 483 F.2d 968, 970 (5 Cir. 1973). Here the evidence of extensive telephone calls between Pederson and Lustig would have been sufficient.

[40] Lustig's other complaints about the jury instructions are frivolous. They also have to be considered against the fact that Lustig's own requested instructions were untimely. Rule 15 of the Rules of the United States District Court for the District of Alaska provides for submission of proposed instructions five days prior to trial. Lustig's instructions were filed the very day that instructions were given. Even if the court had erred, which it did not, the error would have been excusable in light of this tardiness. *See United States v. Tourine,* 428 F.2d 865, 869 (2 Cir.), *cert. denied,* 400 U.S. 1020, 91 S.Ct. 581, 27 L.Ed.2d 631 (1970).

COMMENTS OF PROSECUTOR AND JUDGE

[41, 42] Lustig complains about a comment of the prosecuting attorney, after the verdict, in which he said that the evidence indicated Lustig perjured him-

self when he testified in his own defense. The trial judge may or may not have considered Lustig's testimony in sentencing. It does not matter. A judge may consider the candor of the defendant on the stand in passing sentence. *United States v. Cluchette,* 465 F.2d 749, 754 (9 Cir. 1972). As we have so often held, this court will not review a sentence absent some extraordinary circumstance. *United States v. Buck,* 548 F.2d 871, 877 (9 Cir. 1977). No such circumstance exists here.

[43] Lustig also suggests that the trial judge improperly commented that he found counsel's questions to be "marginally relevant." But the jury had already retired from the courtroom when this statement was made. No prejudice was possible. In any event, the trial judge is vested with power to comment fairly to the jury. *Duke v. United States,* 255 F.2d 721, 728 (9 Cir. 1958).

SUFFICIENCY OF THE EVIDENCE

Lustig argues that the district court erred in not granting a directed verdict on the conspiracy charge because of a lack of evidence. The record shows that the evidence against Lustig was considerable, and far in excess of what has been found by this court to be sufficient.

See, e. g., United States v. Robinson, 546 F.2d 309, 314 (9 Cir. 1976); *United States v. Freie, supra,* 545 F.2d at 1222.

CONCLUSION

The judgments of the district court are AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v. No. 76-2661
GEORGE H. LUSTIG, et al.,
Defendants-Appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v. No. 76-3146
GEORGE H. LUSTIG,
Defendant-Appellants.

ORDER

Before: CARTER, TRASK and KENNEDY, Circuit Judges.

The panels in the above entitled cases have voted in each case to deny the petition of defendant-appellant Lustig for rehearing. Judges Trask and Kennedy in each case have voted to reject the suggestion for rehearing en banc of defendant-appellant Lustig, and Judge Carter so recommends.

The petitions for rehearing and suggestion for rehearing en banc having been circulated to all active judges and no judge having voted for a rehearing en banc,

IT IS ORDERED that the petition for rehearing in each case is DENIED, and the suggestion for rehearing en banc in each case is REJECTED.

APPENDIX B — INDICTMENT AND MINUTE ORDERS AND WRITTEN MEMORANDUM ORDERS OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATE OF AMERICA,
Plaintiff,
v.
GEORGE H. LUSTIG; GREGORY D. PEDERSON; CHERYL RAE SMITH a/k/a Sherri L. Pederson,
Defendants.

Crim. No. A76-51

Violation of 21 U.S.C. §841(a)(1)
COUNTS I, II, III & IV — DISTRIBUTION OF CONTROLLED SUBSTANCE
Violation of 21 U.S.C. §844
COUNT V — POSSESSION OF CONTROLLED SUBSTANCE
Violation of 21 U.S.C. §846
COUNT VI — CONSPIRACY TO DISTRIBUTE CONTROLLED SUBSTANCE

SUPERSEDING INDICTMENT

THE GRAND JURY CHARGES:

COUNT I

On or about February 27, 1976, in the District of Alaska, GEORGE H. LUSTIG knowingly and intentionally did distribute to GREGORY D. PEDERSON approximately 25 grams of cocaine, a Schedule II controlled substance and narcotic

drug, in violation of Title 21, United States Code, Section 841 (a)(1).

COUNT II

On or about February 27, 1976, in the District of Alaska GREGORY D. PEDERSON knowingly and intentionally did distribute approximately 25 grams of cocaine, a Schedule II controlled substance and narcotic drug, in violation of Title 21, United States Code, Section 841 (a)(1).

COUNT III

On or about March 4, 1976, in the District of Alaska, GREGORY D. PEDERSON and CHERYL RAE SMITH a/k/a Sherri L. Pederson did knowingly and intentionally distribute approximately 22.4 grams of cocaine, a Schedule II controlled substance and narcotic drug in violation of Title 21, United States Code, Section 841(a)(1).

COUNT IV

On or about March 10, 1976, in the District of Alaska, GEORGE H. LUSTIG knowingly and intentionally did possess with intent to distribute approximately 55 grams of cocaine, a Schedule II controlled substance and narcotic drug having a purity of approximately 36%, in violation of Title 21, United States Code, Section 841(a)(1).

COUNT V

On or about March 10, 1976, in the District of Alaska, GEORGE H. LUSTIG knowingly and intentionally did possess in a small bone vial approximately 317 milligrams of cocaine, a Schedule II controlled substance and narcotic drug having a purity of approximately 100%, in violation of Title 21, United States Code, Section 844.

COUNT VI

Commencing at a time presently unknown to the Grand Jury and continuing through the period of February 27, 1976, to

March 5, 1976, in the District of Alaska, GEORGE H. LUSTIG, GREGORY D. PEDERSON and CHERYL RAE SMITH a/k/a Sherri L. Pederson, the defendants herein, did wilfully and knowingly combine, conspire, confederate and agree together, with each other and divers other persons whose names are to the Grand Jury unknown, to distribute and possess with intent to distribute controlled substances in violation of Section 841 (a)(1) of Title 21 of the United States Code, all of which is contrary to and in violation of Title 21, United States Code, Section 846.

A TRUE BILL.

_____

GRAND JURY FOREMAN

G. KENT EDWARDS
United States Attorney

By: _____
U.S. Attorney

DATED: _____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,

Plaintiff,

v.

GEORGE H. LUSTIG; GREGORY D. PEDERSON; CHERYL RAE SMITH aka SHERRI L. PEDERSON,

Defendants.

No. A76-51 Cr.

ORDER

THIS CAUSE comes before the court on various motions. Having considered said motions and the legal memoranda filed,

IT IS ORDERED:

1. THAT Lustig's motion for a bill of particulars filed March 23, 1976, is denied as being now moot.

2. THAT Lustig's motion for a bill of particulars, filed March 31, 1976, is denied in light of the government's partial compliance and the authorities cited in opposition to additional compliance;

3. THAT Lustig's motion for severance and separate trials filed March 23, 1976, is denied for the reasons set forth in the government's opposition, particularly Lustig's failure to establish the necessary factual predicate for such motions, *see*, *United States v. Amidzich*, 396 F. Supp. 1140, 1144 (E. D. Wis. 1975);

4. THAT Lustig's motion to dismiss the conspiracy count, Count VI of the superceding indictment is denied for the reason that the government need not set forth any overt acts in furtherance of the conspiracy, *United States v. Miller*, 387 F. Supp. 1097 (D. Conn. 1975); *United States v. DeViteri*, 350 F. Supp. 550 (E. D. N. Y. 1972);

5. THAT Lustig's motion to dismiss the indictment on the grounds that cocaine is not properly classified is denied, *United States v. Marshall*, Slip Op. No. 74-3038, March 24, 1976 (9th Cir.); *United States v. Amidzich*, 396 F. Supp. 1140, 1147 (E. D. Wis. 1975) and the cases cited therein;

6. THAT Lustig's motion to dismiss the indictment on the grounds that the Attorney General of the United States has not complied with sections 811 and 812 of Title 21 is denied for the reason that the schedules have been republished in the Code of Federal Regulations, 21 CFR §1308.12, on April 1, 1975, which is part of the Federal Register, 44 USC 1510;

7. THAT Lustig's motion for inspection and examination is granted;

8. THAT counsel for Lustig and the United States Attorney or an Assistant United States Attorney confer with one another on or before April 19, 1976, to agree upon a method by which such an examination may be accomplished;

9. THAT Lustig's motion to suppress is denied for a failure to establish any factual or legal foundation;

10. THAT Lustig's motion for a continuance or change of place of trial is denied;

11. THAT Pederson's motion for discovery [and] inspection, filed March 30, 1976, is granted as to items numbered 2, 6, and 7, but denied as to the remainder thereof except that item number 1 is granted as to any statements made by defendant Pederson;

12. THAT Pederson shall comply with the government's request for discovery and inspection filed April 5, 1976, as

soon as the government complies with paragraph 11 of this order;

13. THAT Pederson's motion to dismiss the indictment is denied for the reasons set forth in paragraph 6 of this order;

14. THAT Pederson's motion for a continuance is denied;

15. THAT Smith's motion for discovery, filed April 6, 1976, is granted as to items numbered 2 and 3, but denied as to the remainder thereof, except that item number 1 is granted as to any statements made by defendant Smith;

16. THAT Smith shall comply with the government's request for discovery and inspection filed April 5, 1976, as soon as the government complies with paragraph 15 of this order;

17. THAT Smith's motion for bill of particulars and for discovery, filed April 6, 1976, is granted as to item b and denied as to the remainder thereof since no appropriate authorities were cited in support of said motion.

DATED at Anchorage, Alaska, this 16th day of April, 1976.

United States District Judge

cc: U.S. Attorney
William H. Fuld
F. P. Pettyjohn
Ron West

MINUTES OF THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA v. GEORGE LUSTIG
No. A76-51 Cr.

THE HONORABLE JAMES A. VON DER HEYDT

Deputy Clerk	*Reporter*
_____ Jim Meyers	__xx__ Dolores Runner
__xx__ Jeri Whitaker	_____ Mary Krogstad
_____ Jan Nelson	_____ Sandra Shorey

APPEARANCES: Plaintiff: G. Kent Edwards, U.S. Attorney
Defendant: Phillip Weidner

PROCEEDINGS:

At 3:35 p.m. court reconvened.

Defendant's Motion for continuance denied.

Entry of appearance of Phillip Weidner to be filed, and entered.

Motion for substitution of counsel denied.

Motion for stay pending review denied.

Motion to suppress denied.

Motion to reveal any promises of favorable treatment to witnesses for the government denied.

Motion for preservation denied.

Motion for protective order denied.

Motion to reveal exculpatory evidence denied.

Motion for relief from prejudicial joinder denied.

Motion for relief from prejudicial joinder of offenses denied.

At 3:45 p.m. court recessed.

cc: Phillip Weidner
William Fuld
Frederick Pettyjohn
U. S. Attorney

APPENDIX C (CONTAINS CONSTITUTIONAL PROVISIONS, STATUTES, RULES, REGULATIONS).

A) TEXT OF AMENDMENTS TO THE U.S. CONSTITUTION

AMENDMENT [I]

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

AMENDMENT [IV]

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT [V]

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT [VI]

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be

informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

ARTICLE XIV

1. Citizenship rights not to be abridged by states. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdicton the equal protection of the laws.

B) ALASKA CONSTITUTION

ARTICLE I

DECLARATION OF RIGHTS

Section 1. Inherent Rights. This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal rights opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

Section 9. Jeopardy and Self-Incrimination. No person shall be put in jeopardy twice for the same offense. No person shall be compelled in any criminal proceeding to be a witness against himself.

Section 11. Rights of Accused. In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of twelve, except that the legislature may provide for a jury of not more than twelve nor less than six in

courts not of record. The accused is entitled to be informed of the nature and cause of the accusation; to be released on bail, except for capital offenses when the proof is evident or the presumption great; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section 14. Searches and Seizures. The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated. No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Section 22. *Right of Privacy.* The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

C) FEDERAL RULES OF CRIMINAL PROCEDURE

RULE 9. WARRANT OR SUMMONS UPON INDICTMENT OR INFORMATION

(a) *Issuance.* Upon the request of the attorney for the government the court shall issue a warrant for each defendant named in the information, if it is supported by oath, or in the indictment. The clerk shall issue a summons instead of a warrant upon the request of the attorney for the government or by direction of the court. Upon like request or direction he shall issue more than one warrant or summons for the same defendant. He shall deliver the warrant or summons to the marshal or other person authorized by law to execute or serve it. If a defendant fails to appear in the response to the summons, a warrant shall issue.

RULE 31. VERDICT

(a) *Return.* The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.

(b) *Several Defendants.* If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

(c) *Conviction of Less Offense.* The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

(d) *Poll of Jury.* When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

(e) *Criminal Forfeiture.* If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.

As amended Apr. 24, 1972, eff. Oct. 1, 1972.

RULE 43. PRESENCE OF THE DEFENDANT

(a) *Presence Required.* The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) *Continued Presence Not Required.* The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived

his right to be present whenever a defendant, initially present,

(1) voluntarily absents himself after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial), or

(2) after being warned by the court that disruptive conduct will cause him to be removed from the courtroom, persists in conduct which is such as to justify his being excluded from the courtroom.

(c) *Presence Not Required.* A defendant need not be present in the following situations:

(1) A corporation may appear by counsel for all purposes.

(2) In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence.

(3) At a conference or argument upon a question of law.

(4) At a reduction of sentence under Rule 35.

As amended Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub. L. 94-62, Section 3 (35), 89 Stat. 376.

RULE 26. Taking of Testimony

"In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court."

Amended Nov. 20, 1972.

D) Canons of Judicial Ethics

Canon of Judicial Ethics No. 22

"Review. In order that a litigant may secure the full benefit of the right or review accorded to him by law, a trail judge should scrupulously grant to the defeated party opportunity to present the questions arising upon the trial exactly as they arose, were presented, and decided, by full and fair bill of exceptions or otherwise; any failure in this

regard on the part of the judge is peculiarly worthy of condemnation because the wrong done may be irremediable."

E) Federal Rules of Evidence

Article V. Privileges, Rule 501, *General Rule*

"Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to Statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

Article VI. Witnesses, Rule 603, *Oath or Affirmation*

"Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so."

Article VI. Witnesses, Rule 605, *Competency of Judge as Witness*

"The Judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point."

F) SPEEDY TRIAL ACT INTERIM LIMITS 18 U.S.C. 3164

Section 3164. *Interim limits*

(a) During an interim period commencing ninety days following July 1, 1975 and ending on the date immediately preceding the date on which the time limits provided for under section 3161(b) and section 3161(c) of this chapter become effective,

each district shall place into operation an interim plan to assure priority in the trial or other disposition of cases involving—

(1) detained persons who are being held in detention solely because they are awaiting trial, and

(2) released persons who are awaiting trial and have been designated by the attorney for the Government as being of high risk.

(b) During the period such plan is in effect, the trial of any person who falls within subsection (a) (1) or (a) (2) of this section shall commence no later than ninety days following the beginning of such continuous detention or designation of high risk by the attorney for the Government. The trial of any person so detained or designated as being of high risk on or before the first day of the interim period shall commence no later than ninety days following the first day of the interim period.

(d) Failure to commence trial of a detainee as specified in subsection (b), through no fault of the accused or his counsel, or failure to commence trial of a designated releasee as specified in subsection (b), through no fault of the attorney for the Government, shall result in the automatic review by the court of the conditions of release. No detainee, as defined in subsection (a), shall be held in custody pending trial after the expiration of such ninety day period required for the commencement of his trial. A designated releasee, as defined in subsection (a), who is found by the court to have intentionally delayed the trial of his case shall be subject to an order of the court modifying his nonfinancial conditions of release under his title to insure that he shall appear at trial as required.

— UNITED STATES STATUTES

Sec. 841. Prohibited acts A-Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense or possess with intent to manufacture, distribute or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Sec. 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(H) — ALASKA STATUTES

Sec. 25.05.011. Civil contract. (a) Marriage is a civil contract requiring both a license and solemnization which may be entered into by

(1) a male who is 21 years of age or older with a female who is 18 years of age or older, who are otherwise capable, of

(2) those who qualify for a license under Sec. 171 of this chapter.

(b) No person may be joined in marriage in this state until a license has been obtained for that purpose as provided in this chapter. No marriage performed in this state is valid without solemnization as provided in this chapter.

Sec. 25.05.261. Who may solemnize. (a) Marriages may be solemnized

(1) by a minister, priest or rabbi of any church or congregation in the state, or by a commissioned officer of the Salvation Army, or by the principal officer or elder of

recognized churches or congregations which traditionally do not have regular ministers, priests, or rabbis, anywhere within the state;

(2) by a marriage commissioner or judicial officer of the state anywhere within his jurisdiction; or

(3) before or in any religious organization or congregation according to the established ritual or form commonly practiced therein.

(b) No provision of this section shall be construed to waive the requirements for obtaining a marriage license.

Sec. 25.05.311. Marriage without solemnization. A marriage contracted after January 1, 1964, is void unless the marriage has been solemnized as provided in this chapter. If the parties to a marriage void for failure to solemnize the marriage validate the marriage by complying with the requirements of this chapter, the issue of the void marriage are legitimate.

(I) ALASKA REGULATORY PROVISIONS

13 AAC 02.350. *Custody of Vehicle When Operator is Arrested.*

When a police officer arrests and detains the operator of a motor vehicle, the officer shall impound and remove the vehicle to a place of safety; however, the operator may elect to have another immediately available person who is legally licensed to operate a motor vehicle, drive or otherwise remove the vehicle as the operator directs. The operator may designate the nearest available garage or tow car operator of his choosing to remove the vehicle. If the operator does not so indicate, the officer shall make the arrangements necessary to remove the vehicle.

13 AAC 02.375. *Inventory of Impounded Vehicle.*

A police officer who impounds a vehicle for any reason provided by statute, ordinance or regulation shall conduct a complete inventory of the propery in the vehicle at the time of impoundment or as soon after as practicable. The inventory shall be signed by the person to whom the vehicle is released at the time of release.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-405 Cr.

GEORGE H. LUSTIG,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENTAL BRIEF OF INTERVENING AUTHORITY PURSUANT TO SUPREME COURT RULE 24 §§5 IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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October__, 1977

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October 28, 1977

COMES NOW, the Petitioner, GEORGE H. LUSTIG, by and through his attorney, PHILLIP P. WEIDNER, of DRATHMAN, WEIDNER & BRYSON, 333 W. Fourth Avenue, Suite 35, Anchorage, Alaska 99501, Phone (907) 276-7000, and hereby gives notice, pursuant to Rule 24 §§5 of the Supreme Court Rules of Appellant Procedure, that he relies on the following intervening cases that support his position that this Court should grant certiorari on the issue of

> "Whether the Warrantless Search of an Opaque Parcel Seized from Mr. Lustig's Vehicle Absent Probable Cause or the Necessity for an Inventory Search, Violated The Rights to Privacy and Freedom From Illegal Search and Seizure, Under the United States and Alaska Constitutions, *United States v. Chadwick,* 97 S.Ct. 2476 45 S.W. 4798 (6/21/77), and *South Dakota v. Opperman,* 428 U.S. 364 (1976), Where the Search Occurred at Police Headquarters?" (Petition of George H. Lustig in No. 77-405 at pg. 1-2).

I. THE ALASKA SUPREME COURT'S LATEST DECISION ON INVENTORY SEARCHES CONFLICTS WITH THE NINTH CIRCUIT HOLDING ON ALASKAN LAW.

The Court's attention is directed to the decision of the Supreme Court for the State of Alaska in *Timothy Zehrung, Appellant, v. State of Alaska, Appellee,* P.2d , File No. 2823, Slip Op. No. 1501, September 30, 1977, in which the Court specifically held that a "standard procedure" inventory search pursuant to an arrest violated the Alaska Constitution where there was no need for incarceration.

> "The Court in *Dixon* stated that *because the justifications for a preincarceration inventory*[10] *do not exist if the arrestee is not to be incarcerated, no inventory search can be conducted in such cases.*[11] We agree. *We recognize that such a decision necessitates invalidating the standard procedure at the jail.* The current practice at the jail is to conduct an inventory search of all arrestees, whether or not

a particular arrestee is capable of posting bail at the time he or she arrives at the jail.[12] Nevertheless, *we hold that a warrantless jailhouse inventory is without justification when an arrestee is not going to be incarcerated, and it is therefore constitutionally impermissible.*

[10]These justifications are to prevent the entry of money, contraband and weapons into the jail, to protect the arrestee's property, and to protect the jail against arrestee claims for lost or damaged property. *State v. Kaluna,* 520 P.2d 51, 60-61 (Hawaii 1974). In connection with this, *see* Note, The Inventory Search of an Offender Arrested for a Minor Traffic Violations: Its Scope and Constitutional Requirements, 53 B.U.L. Rev. 858, 864 (1973).

[11]222 N.W. 3d at 756.

[12]We do not pass on whether fingerprinting and photographing an arrestee is justified where the arrestee is to be released on bail. In any event, this does not give rise to a justification for an inventory search. (*Zehrung, supra,* Slip, Op. No. 1501 at pg. 7-8; E.A.)

The Petitioner Lustig, likewise submits, that it was a violation of his constitutional rights, and a misinterpretation of Alaska Law, for the Ninth Circuit Court of Appeals to hold that the warrantless seizure of the opaque package from his automobile, and the warrantless search of the parcel at police headquarters, absent probable cause or the necessity for an impoundment of the automobile, was a valid inventory search under Alaska law.

II. THE MINNESOTA SUPREME COURT HAS SPECIFICALLY ADOPTED THE POSITION THAT INVENTORY SEARCHES ARE CONTROLLED BY THE "NECESSITY" DOCTRINE ADVANCED BY THE PETITIONER LUSTIG'

Further, the position of the Petitioner is supported by the holding of the Supreme Court of the State of Minnesota in *State v. Goodrich,* (Minn. 7/15/77) appearing at 21 Cr.L.Rptr. 1077 (August 24, 1977). In *Goodrich, supra,* The Court held that LSD and amphetamines that were found pursuant to an "inventory search" were inadmissible in a later controlled substances prosecution, since the Officers had no right to impound a DWI arrestee's car where other arrangements to have the automobile picked up for safe keeping had been made.

The record in the instant proceeding demonstrates clearly that Mr. Lustig was vehemently demanding that he be allowed to exercise his rights under the Alaska Administrative Code to have his automobile removed by his friends on the scene, such that the case is on all fours with Goodrich, supra, and the decision conflicts with the holding in Zehrung, supra.

III. SUMMARY AND CONCLUSIONS.

This Court should grant certiorari to, 1) Rectify the erroneous decision of the Ninth Circuit as to Alaskan law on inventory searches, and 2) Rule clearly that *South Dakota v. Opperman,* 428 U.S. 364 (1976) and *U.S. v. Chadwick, supra,* cannot be misconstrued to authorize the search of an opaque parcel from a vehicle seized at an arrest, absent the necessity of impoundment, when in fact the arrestee is able to "make other arrangements for the safe keeping of his belongings" pursuant to State procedural rights.

RESPECTFULLY SUBMITTED this 28 day of October, 1977, at Anchorage, Alaska.

PHILLIP P. WEIDNER, Attorney for
Petitioner, George H. Lustig

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 21(1), Rule 33(1), Rule 33(2) (1), and Rule 33(3) (b), of the Supreme Court Rules of Appellate Procedure, that I am a member of the Bar of the U.S. Supreme Court in good standing, and that three copies of the foregoing Supplemental Brief of Intervening Authority Pursuant to Supreme Court Rule 24 §§5 in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were served upon counsel for the Respondent by depositing the same in the United States mail at Anchorage, Alaska, postage pre-paid, addressed to:

Mr. G. Kent Edwards
United States Attorney
605 W. Fourth Avenue
Anchorage, Alaska 99501

and further, that three copies of the foregoing document were served upon the Solicitor General of the United States by depositing the same in the United States mail, at Anchorage, Alaska, postage pre-paid, addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530

and further, that three copies of the foregoing document were served upon counsel for both co-defendants in the instant proceedings below, by depositing the same in the United States mail at Anchorage, Alaska, postage pre-paid, addressed to:

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DATED at Anchorage, Alaska, this 29 day of October, 1977.

PHILLIP P. WEIDNER, Attorney for
Petitioner, George H. Lustig

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-405 Cr.

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v.
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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX D – RELEVANT TRANSCRIPT CITATIONS, AFFIDAVITS, AND OFFERS OF PROOF

APPENDIX E – RELEVANT MOTIONS AND ORDERS PRESERVING ISSUES FOR REVIEW

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September 29th, 1977

IN THE

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OCTOBER TERM, 1977

No. 77-405 Cr.

GEORGE H. LUSTIG,
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UNITED STATES OF AMERICA,
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September 29th, 1977

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TESTIMONY OF CALLIE NEWTON LUSTIG RELATING TO COMMON LAW MARRIAGE

[Transcript of 5/10/76 (Case No. A-76-51 Cr.) at 1964]

Q: How long did you actually live with George?

A: Approximately seven years.

Q: Did you consider yourself married?

A: Yes.

Q: Do you know if he considered you his wife?

A: Yes.

Q: You have two children?

A: Yes.

Q: You said that you have never gone through any kind of ceremony with regard to ministers, Salvation Army, et cetera. Did you ever go through any type of ceremony?

A: We have a very small ceremony, not attended by any witnesses, in 1970.

Q: You say a small personal ceremony. Was the significance of that ceremony to yourself and Mr. Lustig from that point forward that you were married?

A: Yes, we exchanged rings.

Q: Where did that ceremony occur?

A: In the Chitina Valley.

Q: Here in the State of Alaska?

A: Yes.

Q: Now, when, exactly, did you leave Mr. Lustig?

A: September 23, 1975.

II. TRANSCRIPT REFERENCES AS TO RIGHT TO COUNSEL, TO CALL WITNESSES, AND TO PREPARE

[Transcript of 3/16/76 (case No. A-115-73 Cr.) at 24]

"***I don't know if Mr. Lustig wishes me to be his counsel, or if I am the counsel of his choice."

[Transcript of 3/16/76 (Case No. A-115-73 Cr.) at 27]

"MR. FULD. I would have to — based on my brief discussions that I have had with him, it is very difficult. One thing is, it is very difficult to represent a person who is in jail. I feel Mr. Lustig should have the opportunity to consult with other counsel. I am not sure that he would be satisfied with my counsel and this — it is a little hard to go and see him in jail, hard for other people to go in and see him, frankly."

[Transcript of 3/16/76 (Case No. A-115-73 Cr.) at 37]

"So we indicated it was our desire to tie up his liquid assets.***"

[Transcript of 3/16/76 (Case No. A-115-73 Cr.) at 40]

"***Otherwise, I don't think there is an attorney in town knowing that order would touch his man. The only thing he's got is property. He doesn't have cash."

[Transcript of 3/16/76 (Case No. A-115-73 Cr.) at 42]

"***I think that I have serious problems with the case and Mr. Lustig is trying to interview other attorneys."

[Transcript of 3/16/76 (Case No. A-115-73 Cr.) at 45, 46]

"MR. FULD:***I have reasons I don't really want to state that may make it difficult for me. I think he is entitled to an attorney who will defend him the way he wants to be defended. We may have a difference of opinion how to do that."

[Transcript of 3/16/76 (Case No. A-115-73 Cr.) at 46, 47]

"MR. WAGSTAFF: Your Honor, I can't represent to the

court — I can't assume responsibility to find an attorney.***"

"I know it is extremely difficult for someone in jail to find an attorney because it is extremely difficult to get an attorney to go over to jail to talk to someone."

[Transcript of 3/16/76 (Case No. A-115-73 Cr.) at 48]

"MR. WAGSTAFF: An additional comment I would like to make, your Honor, although Mr. Lustig apparently has assets, land, just speaking as an attorney in private practice, attorneys are reluctant to take an interest, even though it is secured in land, as collateral for a fee for the reason that if a hearing is coming up very quickly, which apparently one is, and also under the speedy trial rules, it's important to have some actual cash in order to pay the overhead and also to discharge other responsibilities that exist.***"

"So there is a problem with assets being sufficient to acquire an attorney. There has to be some liquid cash."

[Transcript of 4/27/76 (Case No. A-115-73 Cr.) at 3]

"MR. WEIDNER: *Well, I understand that. I am simply concerned about the interference with Mr. Lustig's right to counsel due to the limited facilities at Sixth and C for consultation. It's almost impossible for me to really see the gentleman.*"

[Transcript of 4/27/76 (Case No. A-115-73 Cr.) at 5, 6]

"The difficulties that we are encountering, Your Honor, are the following: First of all, and this is reflected in these pleadings, there is currently a class action suit that has been filed against the correctional facilities at Sixth and C. Now this is the correctional facility that the Federal Government has a contract with for holding pre-trial detainees and some convicted prisoners.

One of the allegations in that class action suit is that

there is severely restricted access to counsel. Specifically, there is only one holding cell that has been denominated the conference room. That cell is not exclusively for conferences, but in addition, is used as the holding cell. And there are three co-defendants in the instant case that are incarcerated at Sixth and C, so I am having difficulty getting any privacy without competing with the other defense attorneys in the instant case, and, of course, there are other attorneys that want to see their clients. In addition, there is long waiting periods before I can get in, and there is restrictions on how long I can stay, i.e., specifically, ten o'clock.

Another serious difficulty that we are encountering is trying to contact witnesses, due to the conditions here in Alaska, that is, a number of the witnesses I am trying to contact in Mr Lustig's behalf, live in the Bush, or certainly rural communities, and don't have street addresses, street signs, easily identifiable landmarks to find these people."

[Transcript of 4/27/76 (Case No. A-115-73 Cr.) at 8]

"But the primary thing I am here for is to ask Your Honor to rectify the prejudice that is accruing to Mr. Lustig by display of — not simply custodial conditions, but custodial conditions *where he is literally being forced to walk in and out of the courtroom in the company of the co-defendants in a conspiracy trial. And I think it is highly prejudicial.*"

[Transcript of 4/27/76 (Case No. A-115-73 Cr.) at 17, 18]

"Now, the real issue here, or one of the main issues is the conditions at Sixth and C, the impossibility of conducting an effective defense while someone is incarcerated there. We are not arguing that every defendant has a right to be released during his trial. *I am trying to point out that one*

of the big problems here are the conditions at Sixth and C. The class action suit I referred to is Mosley, et al., versus Williamson and Wanaka, et cetera, and it has been, it has been supported by substantial case authority, particularly briefs filed in New Orleans, in Harris County situation, and California, as to the fact that the man has a right to effective assistance of counsel in pretrial incarceration."

[Transcript of 4/27/76 (Case No. A-115-73 Cr.) at 19, 20]

"*Now he says that there are no other witnesses that are critical. Well, I don't know how well the prosecutor knows his case, but I have reason to believe, and I would represent to the Court, that there is a high likelihood that there were other witnesses to the arrest. And I am speaking now of the arrest when the bench warrant was served on Mr. Lustig pursuant to the secret Indictment.* This is a critical, critical, critical, situation because the major evidence against Mr. Lustig at the trial, and the major evidence that I understand Your Honor relied upon with regard to any kind of factual findings that there might be a revocation, is the possession charge, possession of alleged cocaine at the time of the arrest. *So it is quite critical that we find witnesses to that arrest.* Not only is it important that we find these witnesses, but I have reason to believe that should we find these witnesses, that I need other witnesses that may have to actually impeach my own witness, but I think they are going to be hostile. But that's critical, and I am loathed to even reveal that much, since Mr. Lustig has Fifth Amendment rights. But I am trying to indicate to Your Honor the good faith of my allegations that I am looking for witnesses, and that's who I am looking for, in particular, are witnesses that are going to help us in defending against that possession at the time of arrest."

[Transcript of 3/26/76 (Case No. A-76-51 Cr.) at 11]

MR FULD: Your Honor, first on the withdrawal. I am not representing that it is that — well, that Mr. Lustig and myself — one of my partners could not reach agreement on my representing him. We have not done so at this point. And he tells me that in my memorandum where I said — does not say he does not want me to represent him, he wants the opportunity to consult other attorneys. My own feeling is at this time that I don't believe, and I think I made it clear in the other case in which I appeared on the probation revocation, that there could well — I can see developing a situation where it could be well impossible to effectively represent Mr. Lustig. I am not talking about any — I mean just in the limited time that I have been talking to him.

I don't want to say anything derogatory of Mr. Lustig. I just feel at this time, until I have more time to talk and see what the defenses are, I should advise the court it may be impossible for me to represent Mr. Lustig based on what he wants done and what I would want to do. I really — I don't think it — I think in my prior appearance I indicated — upon appearing for the bail reduction — I appeared for a lot of people in the last few weeks on these respective indictments and I think I made it clear it was for arraignment only and not in this case, but what I am saying, at some subsequent time we may reach an agreement to my representing him. But I think at this point Mr. Lustig would — I would like to help him in terms of bail, since there is no one else. I requested, or indicated that he wants to talk to other attorneys. I requested two very competent, or three very competent attorneys to go and see him. Apparently, no one has come there to see him. They promised —

THE DEFENDANT: No one has come over there.

MR. FULD: Your Honor, could Mr. Lustig say something?

THE COURT: Yes.

THE DEFENDANT: Your Honor, beginning a week ago, I have been making every attempt to speak to other attorneys, James Gilmore. I tried to get in touch with Mr. Boyko. First of all, I have to wait two or three days before I can make a telephone call. And in the jail there — and I asked other inmates to ask their attorneys to let me speak to them. I have had no success whatsoever in being able to talk to any attorney in a week of trying. That is why I want to be able to be allowed to be released, so I can speak to other attorneys and get one to represent me. *14/*

"Q. Do you believe that your ability to prepare a defense and hire an attorney of your choice, or at least interview other attorneys besides myself and my partners is hampered by being in jail?

A. It certainly is. *I have been attempting for two ceks [sic] to contact various attorneys with virtually no success whatsoever.*

Q. There is a reluctance for attorneys to come down to jail to visit someone, is that what you have found?

A. So far none of them have come down.

Q. It's difficult to make phone calls?

A. It takes about three days to make a phone call when you put in an application." (E.A.)

III. AFFIDAVIT OF DEFENDANT-APPELLANT FROM APPENDIX TO PETITION FOR WRIT OF MANDAMUS AS TO RIGHT TO COUNSEL, TO CALL WITNESSES, AND TO INVESTIGATE.

(D.C. Alaska A76-51 Cr.)
(C.A.9th 76-1919)

Phillip P. Weidner
900 West Fifth Avenue
Anchorage, Alaska 99501

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GEORGE LUSTIG,

Petitioner,

vs.

THE HONORABLE JAMES A. VON DER HEYDT, UNITED STATES DISTRICT COURT JUDGE FOR THE DISTRICT OF ALASKA, UNITED STATES OF AMERICA, GREGORY D. PEDERSON and CHERYL RAE SMITH a/k/a SHERRI L. PEDERSON,

Respondents.

File No. _____
(Cause No. A-76-51 Cr. in the United States District Court for the District of Alaska)

AFFIDAVIT

STATE OF ALASKA
ss.
THIRD JUDICIAL DISTRICT

GEORGE LUSTIG, being first duly sworn on oath, deposes and says:

I wish to address myself to two issues here. The first pertains to my efforts to secure counsel of my choice and need to prepare adequately for my upcoming trial scheduled to begin on the 26th of April. Since the beginning of my incarceration approximately six weeks ago I have done all within my power to communicate with attorneys willing to undertake the necessary preparation of my defense. It has never been by intention to have William Fuld try my case, nor has it been his intention to prepare by defense at trial. It was understood between us since the beginning that Wendel Kay would be my attorney at my trial. It became apparent approximately three weeks ago that because of Mr. Kay's other legal commitments at the time my trial was scheduled to begin and further complicated by health considerations that he would not be able to undertake my defense at that time. Depsite this situation a continuance was denied which would have enable him to undertake my case. Despite constant efforts every day on my part to be allowed to make phone calls, and despite a court order to the effect that I was to receive special consideration in this regard, permission was denied me by jail officials for over a week to contact other attorneys who might be willing to undertake my case, which in my opinion requires extensive preparation including a private investigator to conduct extensive investigation into the circumstances which lead directly to the indictments I am currently charged with.

Finally, on the 17th of April (Saturday) I was granted per-

mission to make a phone call at which time I called a friend (John Grimes) and asked him to contact Bob Wagstaff and Phillip Weidner, both of whom contacted me on Monday the 19th. Weidner came to see me personally and wagstaff contacted me by phone. For over a week prior to this time William Fuld had not been in touch with me at all except to drop a folder off at the front desk on Friday the 16th containing a motion he had submitted as well as some answers to prior motions and a contract for me to sign designating him as my attorney and also containing fee agreements and a handwritten request on the outside of the folder asking me to "write out my defense" and also saying that he would call on me in person in the next few days. He come to see me personally the following Sunday the 18th at which time I reiterated my contention that I had no intention of having him represent me in my upcoming trial in lieu of Mr. Kay and advising him of my concern that none of the preparation for trial or the investigation which I felt were necessary had been conducted. I also told him at this time that I was attempting to secure the services of another attorney. Mr. Weidner had come highly recommended to me by Mr. Wagstaff as well as Michael Rubinstein and Martin Friedman. After spekaing with him at length on the 19th I became very interested in having him represent in my fast approaching trial, but at that time he could not definitely commit himself because of his current employment with the Public Defender Agency, plus a full caseload as well as various other considerations not the least of which was the impossibly short time in which to prepare adequately in the event of a continuance not being granted.

Mr. Weidner, with considerable effort managed to arrange his affairs the next day (the 20th) and was able to commit himself to trying my case. During the next two days he put

tremendous effort into preparing motions and undertaking to study and understand the comples ramifications of the case. Two days later, on the 22nd, after a great deal of study and hard work on Mr. Weidner's part, Mr. Weidner and I appeared before Judge von der Heydt, who peremptorily dismissed my efforts to secure counsel and Mr. Weidner's sincere efforts to effectively represent me as an attempt to "whipsaw the court" and summarily denied every motion as if we had conspired in some sort of flippant effort to thwart the cause of justice. He then declared that hearing at an end and left without hearing any explanation from me and but a very few remarks from my attorney. I would now contend that this violates my constitutional right to a fair trail because of circumstances beyond my control and places my attorney despite his sincere efforts to prepare my defense at a severe disadvantage.

The second issue I would raise at this time, and one which has a direct bearing on all the matters herein discussed, is the fact that I was not given a fair bail to begin with; and when I made efforts to raise it, it was lifted altogether, without basis, and for reasons in no way established in fact or justified in any way thereby denying another of my constitutional rights and consequently substantially contributing to my present dilemna in regard to adequately preparing for trial and securing counsel in a timely fashion.

In sum I have been denied my constitutional rights to counsel, pre-trial investigation, and right to call witnesses in my behalf due to no fault of my own and a cavalier treatment in the court.

Further affiant sayeth naught.

/s/ _____

George Lustig

SUBSCRIBED and SWORN to before me this _____ day of April, 1976.

/s/
_____
Notary Public in and for Alaska
My Commission Expires: ____

IV. EXHIBIT RELATING TO LACK OF TRIAL PREPARATION [Exhibit from Appendix to Appeal from Conditions of Release (D.C. Alaska A-115-73 Cr.) (C.A. 9th No. 76-1925) and Petition for Writ of Mandamus (D.C. Alaska A-76-51 Cr.) (C.A. 9th 76-1919)]

To JORGE Lustig

TRIAL PREPARATION

WRITE DOWN
the defense

NAMES of WITNESSES
I'll be in to
see you this
weekend
Bill —

Return these
to me —

V. AFFIDAVIT OF DEFENSE COUNSEL IN SUPPORT OF REQUEST FOR CONTINUANCE TO PREPARE [R.-235; C.A. 9th 76-2661] [R.-60; C.A. 9th 76-3146]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA.

Plaintiff.

vs.

GEORGE H. LUSTIG, et al.,

Defendants.

Cause No. A-76-51 Cr.
AFFIDAVIT OF COUNSEL.

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

I, PHILLIP P. WEIDNER, being first duly sworn upon his oath, deposes and says:

1. That I am currently employed as an Assistant Public Defender for the State of Alaska.

2. I was contacted on or about Saturday, April , 1976, by

Martin Freidman, indicating that I should contact George Lustig at the State Correctional Facility at 6th Avenue and "C" Street, since he was having difficulties securing an attorney to represent him in the instant case and wanted to see me.

3. Prior to contacting Mr. Lustig I felt bound to contact Robert Wagstaff through Mr. Freidman and Mr. William Fuld personally, in order to ascertain whether there would be any objections by attorneys who I felt might possibly be Mr. Lustig's attorney.

4. *I first saw Mr. Lustig on Monday, April 19, 1976, in the late afternoon.*

5. The interim time period since has been consumed by attempts to ascertain as to whether I can reach a fair agreement with Mr. Lustig, and whether I can sever my employment relationship with the Alaska Public Defender Agency on short notice.

6. I currently am carrying a full appellate case load in the Alaska Public Defender Agency in addition to various commitments with regard to appearances in Superior Court for the State of Alaska in felony matters.

7. I am prohibited by statute from accepting the instant case from Mr. Lustig unless I resign my position with the Alaska Public Defender Agency.

8. I am submitting today my resignation to said agency. (Effective 9:00 a.m., 4/21/76 should this court grant substitution).

9. From the knowledge of the case I have thus far it appears essential to effective assistance of counsel to hire an investigator forthwith relative to certain witnesses for the government, and relative to certain persons who might have had occasion or motive to conspire to seek arrest and conviction of Mr. Lustig.

10. Mr. Lustig has indicated to me distinctly that I am his attorney of choice relative to these charges.

11. The defendant's motion for continuance is made in good faith and not for purposes of delay.

12. I have spoken with Mr. Lustig and he will waive any rights to speedy trial he has for the said sixty (60) day period in order to gain effective assistance of counsel of his choice.

13. It is my opinion as an experienced defense attorney that should Mr. Lustig be forced to trial on Monday, April 26, 1976, the *short time in which I have had to prepare the case will effect Mr. Lustig's rights to confrontation, cross-examination, rights to call witnesses, rights to a fair and impartial jury, and rights to effective assistance of counsel of his choice.*

14. As the attorney of Mr. Lustig's choice it is my sincere desire to discuss with him fully any alternatives he might have with regard to reaching a disposition of the instant proceedings short of trial, and further to ensure that a meritorious sanity defense has not been neglected due to the lack of opportunity of Mr. Lustig to secure the attorney of his choice.

DATED at Anchorage, Alaska, this 21st day of April, 1976.

/s/
PHILLIP P. WEIDNER

SUBSCRIBED AND SWORN to before me this 21st day of April, 1976.

/s/
Notary Public in and for Alaska
My commission expires: 6-25-78

VI. AFFIDAVIT OF WILLIAM FULD AS TO CONFLICT WITH DEFENDANT LUSTIG [R.-66; C.A. 9th 76-2661]

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF ALASKA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
GEORGE H. LUSTIG; GREGORY D. PEDERSON; CHERYL RAE SMITH a/k/a SHERRI L. PEDERSON,)
)
Defendants.)

No. A76-51

AFFIDAVIT OF COUNSEL

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

WILLIAM H. FULD, being first duly sworn upon oath, deposes and says:

THAT I have been ordered by the Court to represent GEORGE LUSTIG although he and I have never entered into any agreement that I would represent him at the trial. After consulting further with Mr. Lustig, *I find it necessary to hire an investigator to investigate the background of the alleged confidential informers who may be witnesses against him and who may have conspired with unknown persons between September of 1975 and the date of Mr. Lustig's arrest to have him charged and convicted of sale of narcotic drugs with which he was never involved.* To carry on the proper investigation requires money

and time. As the attached order of Judge Plummer indicates, Mr. Lustig does not have funds available to hire an attorney, much less an investigator. Since Mr. Lustig has not been released from confinement due to the government's having Mr. Lustig arrested as he was about to be bailed out on the present indictment, it is impossible for me to effectively represent Mr. Lustig in this short time allotted.

As is typical of many attorneys, I have numerous other matters on my calendar and had refrained from entering an appearance for Mr. Lustig out of fear I could not effectively represent him in that short period of time and knowing that he would not be able to raise funds or obtain representation. If Mr. Lustig is given a sixty day continuance, he should be able to raise sufficient funds to hire an investigator by either liquidating trust funds which he is trying to do and by selling real estate.

It is Mr. Lustig's desire to have Mr. Kay represent him at the trial of this case. Mr. Kay is scheduled to be in trial in Fairbanks in the case of *USA v. Samuel Jeffcoat, et al.* commencing April 20th in Fairbanks. It is doubtful if that trial will be completed in time for Mr. Kay to return and participate in the trial of Mr. Lustig scheduled to start April 26th.

Since I have myself prior commitments, including a Supreme Court Brief due April 9th, a Supreme Court Argument on April 19th, a complicated civil case set for April 19th in State Court, and approximately eight other matters, including two misdemeanor trials between now and April 26th, I certainly can not devote to Mr. Lustig's defense that is necessary.

A recent newspaper article which appeared in the Anchorage Times on March 27th, is further grounds for either a delay of this trial so that it's impact will not be as fresh in the minds of the jurors or a change in place of trial. *The newspaper article attached to this affidavit as exhibit "A"*, indicates a number of

prejudicial matters which could well be in the minds of jurors and would deny him a fair jury panel. *The items mentioned in the newspaper which are prejudicial and otherwise inadmissible are* (1) that he *was convicted previously* on charges of smuggling hashish here; (2) that he *faces revocation of probation*; (3) *that he had cocaine worth* $30,000.00; (4) *that his present attorney wants out of the case.*

Present defense counsel also believes that it may be necessary to present psychiatric testimony and full psychiatric evaluation can not be accomplished in three weeks.

FURTHER, YOUR AFFIANT SAYETH NAUGHT.

/s/
WILLIAM FULD

SUBSCRIBED AND SWORN TO before me this 6th day of April, 1976.

/s/
Notary Public

VII. EXHIBIT RELATING TO DIFFICULTY IN OBTAINING COUNSEL [R.-338; C.A. 9th 76-2661] [Appendix to Appeal from Conditions of Release (D.C. Alaska A-115-73 Cr.) (C.A. 9th No. 76-1925), and Petition For Writ of Mandamus (D.C. Alaska A-76-51 Cr.) (C.A. 9th 76-1919)]

J .dge Refuses To Lower Bail

By MORGAN PARKER
Times Staff Writer

U S District Judge Raymond E. Plummer yesterday refused to lower the $50,000 bail set for George H. Lustig of Wasilla who stands accused with two others in a federal indictment alleging they had and sold cocaine.

The lengthy bail review hearing followed the lowering of Lustig's initially set bail last week from $100,000 to $50,000.

Plummer said Lustig will stay in jail as a "danger to the community."

The bearded Wasilla homesteader was convicted previously on charges of smuggling hashish here and faces revocation of his probation on that case in connection with the charges in the federal indictment.

A hearing on the probation revocation petition is set for 10:30 a.m. Friday. It is based on charges that Lustig was arrested for the cocaine sales charges and apparently "was trying to hide" under the police car seat a bag containing "cocaine with a street value of $30,000," said U.S. Attorney G. Kent Edwards.

Lustig's trial for charges in the indictment is set for late April.

He sought the bail reduction — despite his ownership of an estimated $200,000 in land in Anchorage and the Matanuska valley plus a $10,000 trust — saying he doesn't have ready cash and can't get a lawyer while in jail "because they won't come there."

His present attorney, William Fuld, wants out of the case.

Fuld says he disagrees with Lustig about the type of defense which should be launched. Lustig's first conviction took four years.

The defendant took the stand to explain his situation and was aggressively cross-examined by Edwards.

During that cross-questioning, Lustig admitted he left the state against probation rules last September to find his estranged spouse in Vermont. Also, Edwards forced Lustig to evoke the fifth amendment when the prosecutor asked, "Where, then, did you get the money for the cocaine you had when you were arrested?" during the examination of Lustig's finances.

Plummer said he won't approve postponements of hearings in the case because Lustig said he couldn't find counsel. The jurist, in an unusual gesture, asked Attorney Robert Wagstaff in the audience if he could represent Lustig or find someone who could. He apparently wanted to thwart delays of this case against Lustig.

This case, he said, will continue on schedule.

(See Page 2, Col. 8)

Judge Nixes Bail Plea

(Continued From Page 1)

At the bail hearing, the government will try to prove Lustig possessed cocaine on his arrest on the indictment. It was later amended by Edwards to include that post-arrest charge.

Also named in the indictment are Gregory D. Pederson and Cheryl Rae Smith, also known as Sherri L. Pederson.

Count one charges Lustig with distributing to Pederson about 25 grams of the so-called "queen of drugs" on Feb. 27. Count two says Pederson sold that 25 grams to someone else the same day.

The third charge claims the Pederson couple distributed about 22.4 grams of the drug also on Feb. 27. Also charged is that the trio conspired to make the alleged "controlled substances" transactions.

Two additional counts charge that Lustig possessed 55 grams of the drug March 10 when he was arrested and had a "small vial" containing about 317 milligrams of 100 per cent pure cocaine.

The charges against the trio are connected with a recent series of drug arrests made here by federal agents of some 35 people in the Anchorage area.

Trials of all the cases are set to start late next month.

VIII. AFFIDAVIT OF DEFENSE COUNSEL AS TO INABILITY TO CONSULT OR LOCATE WITNESSES AND INVESTIGATE [R.-365; C.A. 9th 76-2661] [R.-63; C.A. 9th 76-3146]

Mr. Phillip P. Weidner
900 West Fifth Avenue
Anchorage, Alaska 99501

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)
Plaintiff,	)
vs.	)
GEORGE LUSTIG, et al.,	)
Defendants.	)
STATE OF ALASKA	)
	) ss.
THIRD JUDICIAL DISTRICT	)

Cause No. A-115-73

AFFIDAVIT IN SUPPORT OF MOTION FOR MODIFICATION OR MOTION TO SET BAIL

COMES NOW the affiant, PHILLIP P. WEIDNER, and first being duly sworn, deposes and says:

1. I am the attorney of record for Mr. George Lustig in the trial of this matter.

2. As reflected by the attached affidavit of motion for con-

timance. Mr. Lustig has been experiencing considerable difficulties in obtaining counsel of his choice, and further, I have had only minimal opportunity to conduct pre-trial investigations in these proceedings.

3. Due to the state of the correctional facilities at 6th Avenue and C Street, Anchorage, Alaska, it is often difficult or impossible to conduct private communications with clients without substantial waiting periods (half an hour to an hour and one-half).

4. Due to the current facilities it is often necessary to wait substantial periods before even seeing clients.

5. There is currently filed in the state courts, a class action suit against those officials charged with maintaining the facilities at 6th Avenue and C Street.

6. One of the causes of action in the said suit is the allegation that the current facilities, and the current practices with regard to phone calls and messages, violate pre-trial detainees' right to effective assistance of counsel of choice.

7. After speaking with Mr. Lustig it appears that it will be necessary to his constitutional rights to call witnesses, constitutional rights to confrontation and cross-examination, and constitutional rights to effective assistance of counsel, that numerous witnesses be contacted and interviewed by the defense.

8. A number of the aforementioned witnesses live in rural portions of Alaska, such that their location will be difficult, if not impossible, to determine on short notice, unless Mr. Lustig was free to assist myself or my defense investigator in locating said witnesses.

9. It appears necessary to effective assistance of counsel for Mr. Lustig to accompany me to view the scene of some of the alleged transactions in the instant proceedings, and for Mr.

Lustig to accompany me to view the scene of the arrest in the instant proceeding.

10. Due to the nature of the charges, and the complexity in the instant proceeding, it appears necessary for reasonable effective assistance of counsel for me to conduct lengthy personal discussions with the defendant during the course of these proceedings.

11. The current facilities at 6th Avenue and C Street now have a curfew of 10:00 p.m. with regard to attorney visits.

12. There are three co-defendants in the instant case, and to my knowledge, at least one of the co-defendants, Gregory Pederson, is lodged at the 6th Avenue and C Street facility, such that both Mr. Pederson's counsel and myself will be competing for the only holding cell that has been nominated a conference room in the correctional facilities at 6th Avenue and C Street.

13. Due to physical structure at the facilities at 6th Avenue and C Street, there is a substantial likelihood that should I be forced to conduct confidential communications with my client during the course of these proceedings at the facility, that passing guards, prisoners, co-defendants, co-defense counsel, agents of the federal and state governments (Troopers, City Policemen, federal marshals) may overhear portions of my conversations in the hall at 6th Avenue and C Street.

FURTHER AFFIANT SAYETH NAUGHT.

DATED at Anchorage, Alaska, this 23rd day of April, 1976.

/s/

PHILLIP P. WEIDNER

SUBSCRIBED AND SWORN to before me this 23rd day of April, 1976.

/s/

Notary Public in and for Alaska
My commission expires: 6/25/78

IX. AFFIDAVIT OF DEFENSE COUNSEL AS TO EFFECTS OF ORDER FREEZING ASSETS [R.-123; C.A. 9th 76-3146]

Phillip P. Weidner
900 West Fifth Avenue
Anchorage, Alaska 99501
907-276-7000

Attorney for the Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE H. LUSTIG,

Defendant.

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

Cause No. A-115-73 Cr.
AFFIDAVIT OF COUNSEL

PHILLIP P. WEIDNER, being first duly sworn upon oath, deposes and says:

1. That I am the attorney of record for the defendant, George H. Lustig;

2. That all of Mr. Lustig's personal immediate cash assets to my knowledge have been exhausted in satisfying child support,

certain expenses of investigation, transcripts, witness fees, psychiatric evaluation, real estate taxes, transcript and record expenses, and/or other court fees and expenses as regards to trial and appeal in Cause No. A76-51 Cr. and the instant proceeding;

3. That while I and Mr. Lustig have a formal written agreement concerning the attorney/client relationship, and fees for legal representation, I have not personally kept any cash funds for satisfaction of said fee;

4. That it is my desire and the desire of Mr. Lustig that restraints on alienation of certain portions of his real property be lifted such that we may begin attempting to liquidate some portion of said real property to satisfy said legal fee, and further, to make reasonable offers of settlement as regards civil litigation now pending against Mr. Lustig in the state courts of the State of Alaska regarding claims against Mr. Lustig as to child support and/or a purported division of property as regards his "common law" spouse, Callie Newton, a k/a Callie Vanderlaan, in Case No. 76-4808;

5. Mr. Lustig's immediate cash assets are such at the present time that I would have to advance him cash for certain appellate expenses and/or travel should this court not release his property for partial liquidation;

6. Mr. Lustig may suffer irreparable harm and injury to his real property assets should they be frozen indefinitely without an adequate opportunity to protect said assets by partial liquidation due to Mr. Lustig's anticipated lengthy incarceration, and present actual incarceration;

7. That the instant motion is made in good faith and not for purposes of delay.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED at Anchorage, Alaska, this 21st day of September, 1976.

/s/

PHILLIP P. WEIDNER
Attorney for Defendant

SUBSCRIBED AND SWORN to before me this 21st day of September, 1976.

/s/

Notary Public in and for Alaska
My commission expires: 6/25/78

X. OFFER OF PROOF RELATIVE TO SEARCH [R.-371; C.A. 9th 76-2661]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA. Plaintiff.	)	
vs.	)	
	)	**Cause No. A76-51 Cr.**
GEORGE H. LUSTIG et al. Defendant.	)	

Offer Of Proof

NOW COMES the Defendant George H. Lustig by and through his attorney Phillip Weidner and makes the following offer of proof to this court for purposes of appeal, that if an evidentiary hearing were granted the facts would establish the following:

1) That the February 27th search and seizure of vehicle allegedly driven by the defendant was made XXX after the defendant had been removed from the vehicle and searched by police, and that the defendant was not in the proximate area of the vehicle.

2) That there are insufficient facts to establish a finding of probable cause to search and seize the vehicle.

3) That it was not the desire of the defendant to have the vehicle impounded nor did he consent to have the vehicle impounded and further he was given no option.

4) That the vehicle was pulled over onto the side of the road and not interfering with traffic, and further that should it have been necessary arrangements could have been made to move the vehicle.

5) That there was no contraband in plain view and no evidence in plain view.

6) That under the circumstances of this case and local law the police lacked authority to impound the vehicle.

By: /s/
Phillip P. Weidner

XI. TESTIMONY ON TRUCK SEARCH AND REMOVAL OF PARCEL TO STATION FOR FURTHER SEARCH [Transcript of 5/5/76 (Case No. A76-51 Cr.) at 1345-1348] (C.A. 9th 76-2661)

Q: (Pause) Sir, when you arrested Mr. Lustig that night, did he make any request to have his car towed away by a friend of his?

A: Yes, I believe he did.

Q: And would these be the gentlemen who arrived in the boom truck?

A: Yes.

Q: Was he adamant about it?

A: Not adamant.

Q: Pretty vocal about it?

A: He stated several times he would prefer to have it. Now —

(Original transcript double spaced).

XII. OFFER OF PROOF ON DEFENSE WITNESSES AND CONTINUANCE

(R-505)

AFFIDAVIT

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

PHYLLIS REZNEK, being first duly sworn upon oath, deposes and says:

The affiant was available at the office of Gregg, Fraties, Petersen, Page & Baxter, 720 M Street, Anchorage, Alaska, at 2:30 p.m. on May 11, 1976 to be served a subpoena to testify as a witness in the case of *United States v. George Lustig*, et. al., Criminal No. A76-51, and the affiant was willing to testify if called. The affiant traveled from Juneau, Alaska to Anchorage, Alaska on the morning of Mary 11, 1976.

/s/
PHYLLIS REZNEK

SUBSCRIBED AND SWORN to before me this 11th day of May, 1976.

/s/
Notary Public in and for Alaska
My Commission expires: 11/22/79

[Transcript of 5/11/76 (Case No. A-76-51 Cr.) at 2027] (C.A. 9th 76-2661)

"MR. WEIDNER: Where? I would like to know where. With regard to us trying to put a subpoena out, we have been trying to locate the woman since the start of this trial.

THE COURT: I know, counsel, but you can subpoena her from the beginning, or long before the trial.

MR. WEIDNER: *I want to point out, your Honor, there was the right to counsel and a reasonable continuance at the start of the trial for locating witnesses. I informed the Court at that time, of the difficulty.* This man was in jail since he was arrested, and he had difficulty contacting counsel.

MR. EDWARDS: He said that he did not try until Friday, to locate her.

MR. WEIDNER: That is not so. I tried to issue a subpoena at that time."

XIII. TRANSCRIPT REFERENCES ON CONFRONTATION

BY MR. WEIDNER:

Q: So you say you have no actual or potential criminal charges pending against you. Did you give Mr. Morgan any heroin before he killed Mr. Flora?

THE COURT: Objection, Your Honor. (Sic.)

THE COURT: Sustained.

* * *

(Jury Excused)

MR. WEIDNER: I asked him if he gave Mr. Morgan heroin before Mr. Morgan killed Mr. Flora, and I can make an offer of proof, and I know he did.

THE COURT: And what is the relevance?

MR. WEIDNER: The relevance is that I think the police know it and it is over his head and that's why he is working for them.

THE COURT: If you want this witness to testify to anything to do with this case you had better get to the issues or he is leaving the stand. I am telling you that now. If you ask one more question like that, he is leaving the stand. I am telling you this, and I am warning you and I will admonish you in front of the jury if you do that once more, and he is leaving the stand. He is here, I presume, to testify as to the issues involved in this case and nothing more. If you do not question him concerning those, he will leave the stand. Is this understood?

MR. WEIDNER: Yes. I would like to make a formal offer of proof as to why I asked the question.

THE COURT: I know why you asked the question and it is obvious on the record.

MR. WEIDNER: No, it isn't, and I want to —

* * *

THE COURT: You haven't asked him. He may deny it.

MR. WEIDNER: He may, but I want to show that the man has a motive and bias before I start asking him these questions. That's a proper question, and all I am asking is —

THE COURT: Don't argue with the court. I have ruled. If you pursue this line of questioning he will leave the stand.

The jury may be recalled.

Now question him concerning the issues in this case. If you do it once more he will leave the stand, like you just did when I sent the jury out. If you do it once more he will leave the stand. I have said it four times and it should be clear.

(The jury is present)

* * *

BY MR. WEIDNER:

Q: Do you know Mr. Morgan?

A: Pardon?

MR. EDWARDS: Objection, Your Honor, it's beyond the scope and is irrelevant.

THE COURT: Sustained.

* * *

(Bench Conference)

MR. WEIDNER: Your Honor, there is one question I would like to ask. Your Honor, there is not just a conviction pending but possible charges and as to the motive for bias and any pending possible charges. I want to find out if he got arrested at the Mexican Border and I want to find out whether Morgan was selling dope and the police know that night he killed Flora and with reference to the gun, and I know the only reason he has to get these people — I have good reason to believe —

THE COURT: Well, it seems that Morgan killed Officer Flora and that he did so during a burglary.

MR. EDWARDS: What date?

THE COURT: It was prior to — it was in the newspapers a year ago, a year and a half ago. Well, I won't permit it, permit the question.

MR. WEIDNER: The question I would like to ask out of the present of the jury is —

THE COURT: I have ruled, counsel. You may not ask it.

(Back in open court)

* * *

MR. WEIDNER: Yes, Your Honor. In regard to my previous offer of proof with regard to this witness, I would like to file Hutchings versus the State at this time. I have a copy for all counsel. I believe it is pertinent as to the offer I made with regard to potential bribes, specifically about any acts he might be prosecuted for.

BY MR. WEIDNER:

Q: Did you know Mr. Morgan?

MR. EDWARDS: Objection, your Honor.

* * *

THE COURT: Yes, it is not within the purview of the direct.

MR. WEIDNER: I just want to ask this question. I am not suggesting any possible questions.

THE COURT: What was the question?

MR. WEIDNER: Do you know Mr. Morgan?

MR. EDWARDS: This was the matter that caused some long discussions the other day to which there was objection.

THE COURT: Well, without anything further, it is sustained. I don't know that there is — there is nothing to base any thought of relevancy on at all.

BY MR. WEIDNER:

Q: Might I just simply ask you this, sir, if the police knew of your activity with Mr. Morgan, would you be concerned?

MR. EDWARDS: Objection, your Honor. He has been directed to stay away from this line of questioning.

THE COURT: Sustained. The jury will disregard the question and draw no inference from it.

(Original transcript double spaced).

(Tr. 1514, 1518, 1791-1792, 1805; (A76-51 Cr.)
(C.A. 9th 76-2661)]

XIV. OFFER OF PROOF ON EFFECTS OF FAILURE TO GRANT INDIVIDUAL JURY POLL AS TO EACH COUNT

Phillip P. Weidner
425 G Street, Suite 520
Anchorage, Alaska 99501

[R.-583; C.A. 9th 76-2661]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA.	)	
	)	
Plaintiff.	)	
	)	
vs.	)	Case No. A-76-51 Cr.
	)	
GEORGE H. LUSTIG, et al.,	)	**AFFIDAVIT OF COUNSEL**
Defendants.	)	
	)	
STATE OF ALASKA	)	
	) ss.	
THIRD JUDICIAL DISTRICT	)	

PHILLIP P. WEIDNER, being first duly sworn upon oath, deposes and says:

1. That I am the attorney of record in the instant proceedings.

2. As reflected by the attached pleadings, it is my desire to preserve the testimony of the jurors impanelled in the instant case relative to the effect of the failure to grant an individual poll as to each count, and as to whether the verdict was unanimous.

3. Further, it is my desire to do such immediately so that the passage of time will not do irreparable damage to defendant's right to a clear record as to the effect of said poll, and as to whether the verdict was unanimous.

4. I have numerous other matters demanding my attention, including but not limited to jury trial June 7, 1976, in *State of Alaska vs. Williams* matter, appearance in Fairbanks the week of May 24, 1976, and a motion to withdraw a plea to first degree murder in the *State of Alaska vs. Morgan* matter, judge trial in the state court *In The Matter of the Custody of Mattheu Link*, starting May 20, 1976, jury trial in a first degree murder case in the matter of *State of Alaska vs. Leroy Gieffels* starting July 19, 1976, several matters to be argued before the Alaska Supreme Court, jury trial in the matter of *United States vs. Sterling Modell Jackson*, now set for June 28, 1976.

5. As reflected by the attached affidavit I have good reason to rely on persons informing me that at least one of the jurors in the instant proceeding has stated that the verdict was not unanimous, and further that the failure of said juror to so indicate in open court was due to the denial of the defendant Lustig's request for an individual poll as to each count.

DATED at Anchorage, Alaska, this 19th day of May, 1976.

/s/
PHILLIP P. WEIDNER

SUBSCRIBED AND SWORN to before me this 19th day of May, 1976.

/s/
Notary Public in and for Alaska
My commission expires: 4/25/79

[R.-625; C.A. 9th 76-2661]

Phillip P. Weidner
425 G Street, Suite 520
Anchorage, Alaska 99501

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. A-76-51 Cr.
	)	
GEORGE H. LUSTIG, et al.,	)	**AFFIDAVIT OF COUNSEL**
Defendant.	)	
	)	
STATE OF ALASKA	)	
	) ss.	
THIRD JUDICIAL DISTRICT	)	

PHILLIP P. WEIDNER, being first duly sworn upon oath, deposes and says:

1. I am the attorney of record for George H. Lustig in Case No. A-76-51 Cr.

2. At the return of the verdict against Mr. Lustig I was aware of non-verbal conduct by at least one juror indicating to me severe manifestations of emotional distress.

3. At the return of said verdict I specifically requested a poll of each juror as to each count against Mr. Lustig, since Mr. Lustig had taken the stand and essentially admitted the elements of the crime of possession of a controlled substance, which was one of the counts against Mr. Lustig.

4. I further requested said poll since I wanted to protect Mr. Lustig's constitutional and statutory rights to inquire of each juror individually as to each separate count.

5. On Friday, May 14, 1976, I inadvertantly was informed that one of the jurors had spoken to another person indicating that the verdict or verdicts against Mr. Lustig were not unanimous. Further, I was informed that said juror had indicated that said juror had expressed in the jury room the view that her mind was undecided as to whether Mr. Lustig was proven guilty beyond a reasonable doubt.

6. I was further informed that said juror had stated that she was informed by the majority jurors that the fact that she was undecided did not matter, but that a verdict had to be reached in order for them to leave.

7. I was further informed that said juror had stated that she wished to express this dissent at the poll of the jury, and was further waiting for the poll with regard to Mr. Lustig, and further was forced to abandon her attempt to express this dissent when the Honorable James A. von der Heydt ruled against my request for an individual poll.

8. I have not personally contacted said juror out of respect for this court's discretion with respect to contacting jurors who are still subject to jury duty.

9. The exact status of my information at the present time is that a person whom I have had occasion to rely on numerous times has informed me of a conversation with a person purportedly to be a close personal friend of said juror as to these events.

10. In order to protect Mr. Lustig's constitutional rights to a unanimous verdict, and further his rights on appeal, it is my desire to either interview said juror forthwith, to take the deposition of said juror forthwith, or take the testimony of said juror in open court in order that a true and fair record can be

made with regard to the effect of the denial of an individual poll as to each count.

11. The attached motions for a new trial, motions for interview or deposition, are made in good faith and not for the purpose of delay.

DATED at Anchorage, Alaska, this 19th day of May, 1976.

/s/

PHILLIP P. WEIDNER

SUBSCRIBED AND SWORN to before me this 19th day of May, 1976.

/s/

Notary Public in and for Alaska
My commission expires: 4/25/79

APPENDIX E – RELEVANT MOTIONS AND ORDERS PRESERVING ISSUES FOR REVIEW

I. MOTION TO HOLD DEFENDANT WITHOUT BAIL AND ORDER DENYING ANY BOND

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,

Plaintiff,

v.

GEORGE LUSTIG,

Defendant.

Crim. No. A-115-73

MOTION TO HOLD DEFENDANT WITHOUT BAIL PENDING HEARING ON REVOCATION OF PROBATION

COMES NOW the United States of America, by G. Kent Edwards, United States Attorney for the District of Alaska, and moves this Honorable Court that the defendant GEORGE LUSTIG be held without bail pending hearing on revocation of probation. This motion is based on the reasons set forth in the attached memorandum.

DATED this 2nd day of April, 1976, at Anchorage, Alaska.

/s/

G. KENT EDWARDS
United States Attorney

[R-47; C.A. 9th 76-3146]

ORDER

For the reasons set forth in the government's memorandum in support of motion to hold defendant without bail pending hearing on revocation of probation, as well as those previously noted by the Court in its bail review check list filed March 26, 1976,

IT IS HEREBY ORDERED that George Lustig be held without bond pending hearing on the petition to revoke his probation in Cause No. A-115-73 Criminal.

DATED this 2nd day of April, 1976, at Anchorage, Alaska.

/s/

RAYMOND E. PLUMMER
U.S. District Court Judge

II. PORTIONS OF PRELIMINARY HEARING MINUTES RELATING TO DENIAL OF BAIL

PRELIMINARY HEARING
April 2, 1976
A-115-73 CR
USA vs George Lustig

* * * *

ORDER

It is hereby ordered that the Order entered on March 16, 1976 setting bail in this case in the amount of $50,000.00 cash or corporate surety, is hereby vacated and set aside and it is now and hereby ordered that the defendant be held without bail pending the final hearing on the government's petition for revocation of probation.

Court adjourned at 4:40 p.m.

cc: U.S. Attorney
U.S. Marshal
U.S. Probation Officer
Kermit E. Barker **[R.-45; C.A. 9th 76-3146]**

III. ORDER FREEZING ASSETS

MINUTES OF THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA, v. GEORGE LUSTIG
No. A-115-73 CR
THE HONORABLE RAYMOND E. PLUMMER,
U.S. DISTRICT JUDGE

Deputy Clerk	*Reporter*
_____ Jim Meyers	_____ Dolores Runner
_____ Jeri Whitaker	__X__ Mary Krogstad
_____ Jan Nelson	_____ Sandra Shorey
_____ _____	

APPEARANCES: Plaintiff: U.S. Attorney G. Kent Edwards.
At 11:03 A.M.
Court convened. Defendant: Present in custody represented by William H. Fuld (Retn'd)
PROCEEDINGS: HEARING ON BAIL REVIEW AND TO DETERMINE STATUS OF DEFENDANT'S LEGAL REPRESENTATION

****

Arguments of counsel heard.

M.O. In addition to terms and conditions, heretofore imposed by the Court in lieu of committing Mr. Lustig after conviction without bail, it is ordered that Mr. Lustig is restrained and enjoined from transferring, conveying, or otherwise encumbering his real personal or mixed property without written permission of this Court until the pending petition for revocation of Probation has been heard and determined; provided however, with the written approval of the Court the assets of the defendant above mentioned may be pledged or otherwise encumbered to guarantee the payment of attorney fees or costs or expenses that may be encurred in preparation of defendant's case in an amount to be approved by the Court in writing.

Statements of counsel heard re hearing on petition for revocation of probation.

Statement of Robert H. Wagstaff, an attorney who was in the audience, re counsel for defendant. Mr. Wagstaff asked by the Court to report no later than Monday morning, April 29, 1976 re progress being made in obtaining counsel for Mr. Lustig.

Hearing on petition for revocation of probation to be held Friday, April 2, 1976 at 10:30 A.M. as previously set by the Court's written order of March 25, 1976.

At 12:57 P.M. court adjourned.

DATE: March 26, 1976 INITIALS /s/
Deputy Clerk

cc: U.S. Attorney G. Kent Edwards
William H. Fuld, Esq.

[R.-28; C.A. 9th 76-3146]

IV. MOTION FOR CONTINUANCE OF TRIAL TO ALLOW TIME TO PREPARE

Phillip P. Weidner
900 West Fifth Avenue
Anchorage, Alaska 99501

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
vs.	)	Cause No. A-76-51 Cr.
GEORGE H. LUSTIG, et al.,	)	**MOTION FOR CONTINUANCE**
Defendants.	)	

COMES NOW the defendant, GEORGE H. LUSTIG, by and through his attorney, PHILLIP P. WEIDNER, and hereby moves this court to grant a continuance of the trial in these proceedings for a period of sixty (60) days on the grounds that as reflected in the attached affidavit of counsel, said period is necessary to effective assistance of counsel of his choice. Further, as reflected by the previous motions and proceedings in this case and by the attached affidavit, defendant's pre-trial incarceration has made it impossible for him to secure counsel of his choice and he has only recently been successful in doing so. Further, as reflected by the attached affidavit, counsel of his choice is endeaving to prepare forthwith for the instant proceeding such that a day certain trial can be set within sixty (60) days. Moreover, defendant is fully prepared to waive any speedy trial rights he might have for said sixty (60) day period.

DATED at Anchorage, Alaska, this 21st dav of April, 1976.

/s/
PHILLIP P. WEIDNER
Attorney for George Lustig

[R.-233; C.A. 9th 76-2661]

V. MOTION FOR STAY OF TRIAL PENDING REVIEW
[R.-238; C.A. 9th 76-2661]

Mr. Phillip P. Weidner
900 West Fifth Avenue
Anchorage, Alaska 99501

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Cause No. A-76-51 Cr.
	)	
GEORGE H. LUSTIG, et al.,	)	**MOTION FOR STAY PENDING REVIEW**
	)	
Defendants.	)	

COMES NOW the defendant, GEORGE H. LUSTIG, by and through his attorney, PHILLIP P. WEIDNER, and hereby moves this court to issue a stay of the trial in these proceedings now set for April 26, 1976, and the order denying his motion for a continuance on the grounds that, as reflected in the attached affidavit of counsel, said counsel intends forthwith to travel to San Francisco to request the Ninth Circuit Court of Appeals to issue a stay of the trial on the grounds that the continuance requested is necessary for effective assistance of counsel.

This motion is made pursuant to the requirements of Appellate Rule 8 and Criminal Rule 38(a). Further, this motion is made on the grounds that defendant intends to pursue his rights under Appellate Rule 5 to move for an appeal of the interlocutory order under 28 U.S.C., Section 1292(b).

* * *

VI. MOTION TO SUPPRESS

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
GEORGE LUSTIG,	)	
	)	
Defendant.	)	
	)	

No. A76-51

MOTION TO SUPPRESS

COMES NOW the defendant by and through his attorney of record, and moves this Court to suppress all evidence and items seized from the truck defendant, GEORGE LUSTIG, was allegedly driving at the time of his arrest on the grounds that there was no search warrant for the search of the truck. The search was not incidental to an arrest as the truck was searched after Mr. Lustig was in custody and not incident to an arrest. Defendant also moves to suppress all items that the Government may intent to use against him as a result of a search of Mr. Lustig's homestead on the grounds that the affidavit supporting the search was not sufficient to authorize a search during the night time based on analysis of affidavits.

DATED this 30th day of March, 1976.

KAY, CHRISTIE, FULD & SAVILLE
/s/
WILLIAM H. FULD

[R.-43; C.A. 9th 76-2661]

VII. MOTION TO RECONSIDER DENIAL OF SUPPRESSION MOTION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
GEORGE H. LUSTIG; GREGORY D.)
PEDERSON; CHERYL RAE SMITH,)
a/k/a SHERRI L. PEDERSON,)
)
Defendants.)

No. A76-51

MOTION TO RECONSIDER PARAGRAPH NINE OF THE COURT'S ORDER

NOW COMES the defendant, GEORGE LUSTIG, and moves the Court to reconsider it's rulings regarding motion to suppress on the grounds that defense was not aware of the factual basis and could not be aware of the factual basis until certain police reports were produced which were done after the motion was made. Furthermore, the attached memorandum demonstrates the factual basis would depend on a hearing. We believe the police testimony would show that there was a search of the truck after Lustig had been removed from the truck.

DATED this 16th day of April, 1976.

KAY, CHRISTIE, FULD & SAVILLE
/s/
WILLIAM H. FULD

[R.-210; C.A. 9th 76-2661]

VIII. MEMORANDUM REGARDING SUPPRESSION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
GEORGE H. LUSTIG; GREGORY D.)
PEDERSON; CHERYL RAE SMITH,)
a/k/a SHERRI L. PEDERSON,)
)
Defendants.)

No. A76-51

MEMORANDUM REGARDING SEARCH AND SEIZURE

All of the Government's memorandums point out that defendant GEORGE LUSTIG has not cited adequate legal authority and failed to supply evidence that the search of the truck was not incidental to the arrest. Attached to this memorandum is a page of the police report which was just produced. This police report shows evidence that "a subsequent search of the vehicle revealed marijuana, scales and a bag sealing machine".

Based on conversations with defendant, I believe that an evidentiary hearing would establish that there was a search of the vehicle in which Lustig was arrested and that the items discovered were not in plain sight and that at the time of the search, Lustig was not in the presence of the vehicle being searched, having been removed to the police car. For these reasons and based on the following authorities, we believe an illegal search of a vehicle took place. Note that even the cases cited by the defendant on search of a vehicle seem to emphasize

a seizure of property in plain sight (see page 4 of plaintiff's brief) is proper and not prohibited. Therefore the authorities cited by the government do not compel admission. On a search without a warrant, the government should have the burden of pursuasion that the search was legal. We would cite the following authorities: *Coolidge v. New Hampshire*, 403 U.S., 443 (1971), stands for the proposition that just because an automobile was involved, does not mean that the police can do away with warrant requirements, nor does the defendant lose the protection of the Fourth Amendment and his right to privacy, see also, *People v. Miller*, 496 P.2d 1228 at 1231 (California 1972). The police may certainly conduct a limited frisk of persons properly arrested and anything seized on the person may be used against them, *U.S. v. Robinson*, 414 U.S. 218 (1973), however, a search without a warrant is limited to the arrestee's person and the area in his immediate control, *Shimel v. California*, 395 U.S. 752 and *Terry v. Ohio*, 392 U.S. 27. These cases point out the policy of the law is to place a neutral judge between police wanting to search and individuals asserting their right to privacy.

We believe under the applicable law, a hearing would establish lack of exigent circumstances since the vehicle was in fact impounded, lack of probable cause to search the vehicle and that the so-called contraband was discovered by a search. A hearing would establish that two State Troopers who had some contact with Mr. Lustig, but had no knowledge that the vehicle in which he was stopped had ever been used for transporting narcotics.

DATED this 16th day of April, 1976.

KAY, CHRISTIE, FULD & SAVILLE

/s/

[R.-212; C.A. 9th 76-2661] WILLIAM H. FULD

IX. DENIAL OF MOTION TO RECONSIDER SUPPRESSION ISSUES

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)
Plaintiff,	)
v.	)
GEORGE H. LUSTIG; GREGORY D. PEDERSON; CHERYL RAE SMITH aka SHERRI L. PEDERSON,	)
Defendants.	)

No. A76-51 Cr.

ORDER

THIE CAUSE comes before the court upon defendant Lustig's motion to reconsider paragraph nine of this court's order of April 16, 1976. That paragraph denied Lustig's motion to suppress for failure to establish any legal or factual foundation for such motion.

Lustig has yet to make the specific, detailed, and non-conjectural factual allegations that are a prerequisite for an evidentiary hearing. *United States v. Amidzich*, 396 F. Supp. 1140, 1145-46 (E. D. Wis. 1975). Furthermore, the court does not understand how Lustig could, in good faith, allege facts that would require suppression of the evidence seized. Giving Lustig every reasonable factual inference, it would appear that the search was incident to a lawful arrest. *United States v. Berryhill*, 445 F.2d 1189 (9th Cir. 1971); *United States v. Wood 468* F.2d 1024 (9th Cir. 1972); *United States v. Lee*, 505 F.2d 845, 855 (9th Cir. 1974).

Accordingly, IT IS ORDERED:

THAT defendant Lustig's motion to suppress is denied.

DATED at Anchorage, Alaska, this 19th day of April, 1976.

/s/
United States District Judge

cc: U. S. Attroney
William H. Fuld
F. P. Pettyjohn
Ronald West

[R.-218; C.A. 9th 76-2661]

X. MOTION TO SUPPRESS

Mr. Phillip P. Weidner
900 West Fifth Avenue
Anchorage, Alaska 99501

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Cause No. A-76-51 Cr.
	)	
GEORGE H. LUSTIG, et al.,	)	**MOTION TO SUPPRESS**
	)	
Defendants.	)	
	)	

COMES NOW the defendant, GEORGE H. LUSTIG, by and through his attorney, PHILLIP P. WEIDNER, and hereby moves this court to issue an order suppressing the use of any of the fruits of the illegal arrest of the defendant occasioned by the service on defendant of a federal warrant for his arrest by officers and/or agents of the State of Alaska absent an adequate prior showing on the record of the necessity for such warrant rather than a summons pursuant to Criminal Rule 9, Criminal Rule 4, and the comparable criminal rules government procedure in the state courts, and governing the service of warrants by state officers, and the appropriate state statutes relating to service of said warrants.

Further, the defendant moves to suppress the use of any of the fruits of the illegal search of the defendant's vehicle. Specifically, defendant maintains that said search was not a valid "inventory search", not a valid search incident to an arrest,

since that search was conducted by state officers who would be governed by *Daygee v. State*, 514 P.2d 1159 (Alaska 1973); *Schraff v. State* (Alaska Supreme Court 1975); and *Speitz v. State*, (Alaska Supreme Court 1974).

Further, the defendant moves to suppress the scales and sealing machine alleged seized from his vehicle on the grounds that said search and seizure was conducted by state authorities governed by the Alaska State Constitution and the appropriate Alaska rules and statutes and said constitution, rules and statutes prohibit the seizure of mere evidence absent a valid search warrant. *See, Daygee v. State, supra.*

DATED at Anchorage, Alaska, this 23rd day of April, 1976.

/s/

PHILLIP P. WEIDNER
Attorney for George Lustig

[R-263; C.A. 9th 76-2661]

XI. MOTION TO RECONSIDER ON SUPPRESSION ISSUES AND SUPPORTING MEMORANDUM

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF ALASKA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
	)	
	)	
	)	
vs.	)	
	)	Cause No A 76-51 Cr.
	)	
	)	
GEORGE H. LUSTIG et al.	)	
Defendant.	)	

MOTION TO TAKE JUDICIAL NOTICE AND RECONSIDER ON ISSUES OF SUPPRESSION.

NOW COMES the defendant George H. Lustig by and through his attorney Phillip Weidner and requests that this court:

1) Reconsider its earlier ruling pertaining to the warrantless search and seizure on February 27th 1976 of a vehicle allegedly driven by the defendant at the time of his arrest as well as the unlawful and warrantless seizure of items in that truck, all of which is in violation of the defendants Constitutional Rights as guaranteed by the 4th amendment. The defendant urges this court to reconsider and suppress before the evidence's introduction into evidence which will irreperably prejudice the jury.

2) Further reconsider its earlier ruling regarding an evidence hearing to determine factual issues in the above search so that the government may be given an opportunity to meet its burden of establishing an exception to the warrant requirement.

3) Further take judicial notice of the case of *United States*

v. *Bidwell*. NOW PENDING IN THE United States District Court of Alaska (Judge Fitzgerald) where on facts believed to be similar to this case, the trial court suppressed evidence seized as being unlawful, and establishes good cause to reconsider.

4) This motion and all previous motions to Suppress and hold an evidentiary hearing is further supported by the attached supplimental motion and supplimental authority which defendant hopes will be of assistance to the court.

By: /s/
Phillip P. Weidner

DATED THIS 2nd day of May, 1976.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff.	)	
vs.	)	Cause No A-76-51 Cr.
GEORGE H. LUSTIG, et al, Defendant.	)	

SUPPLIMENTAL MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER AND SUPPRESS CITING ADDITIONAL AUTHORITY.

It is again stated that Defendant urges this court to recognize that absent probable cause to search the vehicle defendant was

allegedly driving on February 27th, that the seizure and search of the vehicle may not stand. Once the defendant is out of the car and arrested, he is not proximate to the vehicle to justify the search incident exception. Absent a warrant it is the states burden to establish at an evidentiary hearing that there is an exception to the warrant requirement.[1]

At this point in the trial the evidence has been in sight of the jury, but not introduced and not alluded to by testimony. There is still time for this court to grant an evidentiary hearing out of the presence of the jury, to suppress any illegally seized evidence and avert undue influence on the jury.

The only authority cited by the government in support of a search like this is the case of *U.S. v. Robinson*, 414 U.S. 218 (1973). The holding in that case is strictly limited to searches of person, and has nothing to do with searches of cars when the defendant has already been removed. Defendant at an evidentiary hearing could establish that the search took place well after his arrest and removal from the car, and further that the automobile was not interfering with traffic but was on the side of the road. Absent probable cause the Police had no occasion to search and seize the vehicle.

In the attached recent search case, the Supreme Court in *Texas v. White*, 96 S.Ct. 304 (1975) upheld a search of an automobile but again stressed that there must be probable cause to believe contraba as in the car. *Chambers v. Marony*, 399 U.S. 42, 90 S.Ct. 1975. The probable cause in *Texas v. White, Supra*, is absent in this case. The attached Law Review Article adds further support to the necessity of probable cause to search the vehicle, independent of the police authority to arrest the Defendant, and the attached motions and decision by Judge Fitzgerald (now being appealed to the 9th Circuit) further underline the problem as being one of merit.

Defendant thus urges this court to reconsider its earlier ruling regarding time and recognize good cause while there is still time to grant an evidentiary hearing and suppress illegally seized evidence, in order to avoid prejudicial introduction of the evidence.

Of critical importance is the fact that there was no necessity to impound and inventory the vehicle, and that the defendant in no way requested such an impoundment or desired it. See *Texas v. White Supra*. (Dissenting Opinion Of Brennan)

By: /s/
Phillip Weidner

Dated This 2nd day of May, 1976.

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1. Admitted in Opposition Memo page 3.

[R.-385; C.A. 9th 76-2661]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff,	
vs.	Case No. A 75-109 Cr.
ROBERT LLOYD LUSK, BILLY JOE BIDWELL, and SUSAN CAROL RUSTIGAN, Defendants.	**MEMORANDUM AND ORDER GRANTING MOTION TO SUPPRESS**

On December 12, 1975 an evidentiary hearing was held on defendant Bidwell's motion to suppress the evidence seized from his vehicle. At the conclusion of the evidence, the court found that the plain view of what appeared to be an amphetamine tablet on the front seat of the vehicle did not constitute probable cause to search the vehicle for concealed drugs.

Even assuming that the plain view of what appeared to be an amphetamine tablet on the front seat of Bidwell's vehicle gave the police probable cause to search the vehicle for concealed contraband, the warrantless search and seizure was illegal unless there were exigent circumstances justifying the failure to procure a warrant. *Coolidge v. New Hampshire*, 403 U.S. 443, 468 (1971); *United States v. McCormick*, 502 F.2d 281, 287 (9th Cir. 1974). The government has not shown the existence of exigent circumstances.

The government seeks to justify the warrantless search of the vehicle on two alternative grounds: (1) 49 U.S.C. §782 authorized the police to make an immediate warrantless seizure of the

vehicle on the belief that it was being used, or had been used, to carry contraband; (2) The officers had the right to impound the vehicle after Bidwell's arrest and to inventory its contents.

The Ninth Circuit has rejected the government's contention that 49 U.S.C. §782 independently authorizes the warrantless seizure of a vehicle that the police have probable cause to believe was being used or had been used to conceal or transport contraband. *United States v. McCormick*, 502 F.2d 281 (9th Cir. 1974), held that before seizing a vehicle under Section 782, the police must first obtain a valid warrant except in circumstances which qualify as an exception to the warrant requirement. Moreover, the government cannot rely on 49 U.S.C. §782 to justify the search in this case because the record establishes that the government did not seize the vehicle for forfeiture purposes and has not instituted forfeiture proceedings.

Alternatively, the government contends that the police had the right, pursuant to the rules and procedures of the Alaska State Troopers, to impound the vehicle subsequent to Bidwell's arrest and to inventory the contents of the vehicle. There is considerable authority upholding the seizure of contraband during inventory of property in a vehicle that has been impounded pursuant to standard police procedure. See *United States v. Mitchell*, 458 F.2d 960 (9th Cir. 1972); *Cooper v. California*, 386 U.S. 58 (1967). These cases establish the rule that an inventory search of a vehicle is valid where the police have lawfully impounded a vehicle. In the seizure of Bidwell's car, however, it appears that the police deviated from Alaska procedure.

Under Alaska law the inventory of the contents of a vehicle is proper and is, in fact, required when the police must take custody of a vehicle. The Alaska Administrative Code, however, does not give police officers carte blanche to seize a vehicle

when the operator is arrested but provides instead that the arrestee may elect to have an available person or two car operator remove his vehicle .13 A.C.C.02.350. There is no showing here that the government followed the code procedure for removing Bidwell's vehicle. Therefore, the search cannot be sustained as a valid inventory search.

Having found that there was neither probable cause to search Bidwell's vehicle for concealed contraband nor exigent circumstances to justify the warrantless search and that the search cannot be sustained on the basis of either 49 U.S.C. §782 or 13 A.C.C. 02.350,

IT IS ORDERED that defendant Bidwell's motion to suppress the evidence seized from his vehicle is granted.

MADE AND ENTERED at Anchorage, Alaska, this 7th day of January, 1976.

/s/
JAMES M. FITZGERALD
United States District Judge

cc: U.S. Attorney
Hal Horton
Joseph Palmier
Sandra Saville

[R.-410; C.A. 9th 76-2661]

XII. MOTION FOR MISTRIAL DUE TO DENIAL OF RIGHT TO BE PRESENT

Mr. Phillip Weidner
900 West Fifth Avenue
Anchorage, Alaska 99501

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
	)	
vs.	)	Cause No. A-76-51 Cr.
	)	
GEORGE H. LUSTIG, et al.,	)	
Defendants.	)	
	)	

MOTION FOR MISTRIAL

NOW COMES the defendant, George H. Lustig, and requests that this court grant a mistrial of the above-captioned case pursuant to the 6th and 8th amendment and criminal rule of Federal Procedure 43. This motion is supported by the following memorandum and attached authority.

By His Attorney: /s/
PHILLIP P. WEIDNER

DATED this 29th day of April, 1976.

[R.-316; C.A. 9th 76-2661]

XIII. MEMORANDUM IN SUPPORT OF MOTION FOR MISTRIAL DUE TO RIGHT TO BE PRESENT

Mr. Phillip P. Weidner
900 West Fifth Avenue
Anchorage, Alaska 99501

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	Cause No. A-76-51 Cr.
GEORGE H. LUSTIG, et. al.	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF MOTION

The record will reflect that on Wednesday, May 28th, 1976 in the morning, a juror in the above-captioned case approached the trial court judge and communicated an indication of his difficulty in sitting as an impartial juror. The trial court judge then questioned the juror as to the nature of the problem in his chambers. The defendant, George H. Lustig, was not present during the examination of the juror. Nor was defense counsel. The judge then returned to open court and in the presence of counsel and the defendant explained the problem existed. The trial court judge did not divulge the exact nature of the alleged prejudice except to say that the juror had indicated that he realized during testimony that he had a friend that might have had some problems with one of the defendants which might make impartiality difficult. The exact nature of the "problem" and the defendant referred to still remains unknown to defendants. At this point the trial court inquired of counsel if there was objection to the removal of the juror during trial. Defendant Lustig then moved that the court hold a hearing on the record so that the defendant might be present during the examination

of the juror so that he might know the nature of the stated prejudice and thus intelligently decide whether or not to object to the removal of the juror and thereby consent to the seating of the alternate. The defendant also requested a hearing in his presence so that he might enjoy his right to be present at all stages of the trial. These requests were denied. The defendant then objected to the removal of the juror absent opportunity for the defendant to have a hearing on the record and in his presence. Over objection, the trial court removed the juror and seated the alternate.

It is the position of the defendant that the removal of the juror under these circumstances is grounds for a mistrial because it effectively denies him his constitutional rights as guaranteed by the 5th and 6th amendments to the United States Constitution as well as Criminal Rules 43 of Federal Procedure. Rule 43 states:

> The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict and at the imposition of sentence except as otherwise provided by this rule.

Rule 43(c) then lists four exceptions to the rule. Questioning of a juror for potential prejudice is not one of the four exceptions to the rule. On the contrary the specific inclusion requiring defendants presence during initial questioning of the jury seems a clear indication that later questioning of a juror would equally mandate the defendant's presence. The important purpose of Rule 43 is clear.

> "A leading principal that pervades the entire law of criminal procedure is that after the indictment found nothing shall be done in the absence of the prisoner." *Lewis v. U.S.* 1892, 13 S. Ct. 136, 137, 146 U.S. 370, 372. Wright, Federal Practice and Procedure Volume 3, Section 721 and many cases cited therein.

[R.-317; C.A. 9th 76-2661]

XIV. MOTION TO REOPEN OR DECLARE A MISTRIAL DUE TO DENIAL OF OPPORTUNITY TO CALL PHYLLIS RESNEK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
v.	)
	)
GEORGE H. LUSTIG, et al.	)
	)
Defendants.	)
	)

No. A 76-51 Cr.

MOTION TO REOPEN OR DECLARE A MISTRIAL.

Comes now the defendant, George Lustig, by and through his attorney, Phillip P. Weidner and hereby moves this court to allow him to reopen the evidence in this proceeding to call the witness Phyllis Resnek as a witness in his case in chief or as a surrebuttal witness. In the alternative the defendant requests this court to declare a mistrial. This motion is based on the grounds that the defendant's constitutional right to call witnesses in his behalf, and his constitutional right to cross examine and confront his accusers has been violated by the refusal of a requested four hour continuance to call said witness. Further as reflected by the attached affidavit, said witness was in fact contacted by the defendant's investigator at 2:30 P.M. on May 11, 1976 and was then available to testify.

Respectfully submitted,

[R.-504; C.A. 9th 76-2661] Phillip P. Weidner

XV. REQUEST FOR HEARING AS TO EFFECTS OF FAILURE TO GRANT INDIVIDUAL JUROR POLL

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. A-76-51 Cr.
	)	
GEORGE H. LUSTIG, et al.,	)	**REQUEST FOR HEARING**
	)	
Defendants.	)	

COMES NOW the defendant, GEORGE H. LUSTIG, by and through his attorney, PHILLIP P. WEIDNER, and hereby requests this court to grant him a hearing in open court on the attached Motion for a New Trial, Motion for Permission to Interview Jurors or Take Deposition of Jurors, and Motion for Mistrial.

This request is made on the grounds that as reflected by the attached affidavits and memorandum, counsel for the defendant has good cause to believe that the verdict purportedly entered against defendant Lustig in these proceedings was not unanimous, and counsel for the defendant wishes to make a formal offer of proof on the record as to the basis of his reason for said belief, such that the defendant's right to a clear record for purposes of appeal may be preserved.

Respectfully submitted this 19th day of May, 1976, at Anchorage, Alaska.

PHILLIP P. WEIDNER
Attorney for Defendant Lustig

[R.-582; C.A. 9th 76-2661]

XVI. MOTION FOR NEW TRIAL DUE TO NON-UNANIMOUS VERDICT

Phillip P. Weidner
425 G Street, Suite 520
Anchorage, Alaska 99501

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. A-76-51 Cr.
	)	
GEORGE H. LUSTIG, et al.,	)	**MOTION FOR A NEW TRIAL**
	)	
Defendants.	)	

COMES NOW the defendant, GEORGE H. LUSTIG, by and through his attorney, PHILLIP P. WEIDNER, and hereby moves this court pursuant to Criminal Rule 33, to enter an order granting him a new trial in these proceedings, on the grounds that said new trial is required in the interest of justice.

Specifically, as reflected in the attached affidavit and memorandum, it is the position of the defendant Lustig that the verdicts entered against him in these proceedings were not pursuant to unanimous decision of the trial jurors as mandated by the United States Constitution, the Constitution of the State of Alaska, Criminal Rule 31, and Criminal Rule 23.

Further, it is the position of the defendant Lustig that the denial of his request to poll the jury individually as to each count contributed to the failure of the juror or jurors who were in the minority to speak in open court. Thus, the defendant maintains that a new trial should be ordered forthwith since

said denial of the poll was in contravention of Criminal Rule 31(d), and the defendant's constitutional and common-law right to a unanimous verdict guaranteed by a poll with regard to each individual count in open court.

Thus, defendant respectfully requests this court to consider evidence forthwith from said minority juror or jurors, and to declare a new trial be granted in the interest of justice.

Further, this motion is timely since made within seven (7) days after verdict pursuant to Criminal Rule 33.

DATED at Anchorage, Alaska, this 19th day of May, 1976.

PHILLIP P. WEIDNER
Attorney for Defendant Lustig

[R.-585; C.A. 9th 76-2661]

Filed in the Supreme Court of the United States on behalf of the Petitioner, George H. Lustig, this 29th day of September, 1977.

/s/ Phillip P. Weidner
PHILLIP P. WEIDNER
Attorney for Petitioner
George H. Lustig

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that pursuant to Rule 21(1), Rule 33(1), Rule 33(2)(1), and Rule 33(3)(b), of the Supreme Court Rules of Appellate Procedure, that I am a member of the Bar of the U.S. Supreme Court in good standing, and that three copies of the foregoing Appendix D and Appendix E to Petition for A Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit were served upon counsel for the Respondent, by depositing the same in the United States mail at Anchorage, Alaska, postage pre-paid, addressed to:

Mr. G. Kent Edwards
U.S. Attorney
605 West Fourth Avenue
Anchorage, Alaska 9950

and further, that three copies of the foregoing Appendix D and Appendix E to Petition for A Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit was served upon the Solicitor General of the United States by depositing the same in the United States mail, at Anchorage, Alaska, postage pre-paid, addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530

and further, that three copies of the foregoing Appendix D and Appendix E to Petition for A Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit were served upon counsel for both co-defendants in the instant proceedings below, by depositing the same in the United States mail at Anchorage, Alaska, postage pre-paid, addressed to:

Mr. F. P. Pettyjohn
631 "I" Street
Anchorage, Alaska 99501
Attorney for George D. Pederson

George L. Schraer
2715 Hillegass Avenue, #4
Berkeley, California 94705
Attorney for Cheryl Rae Pederson

DATED at Anchorage, Alaska, this 29th day of September, 1977.

Philip P. Weidner

PHILLIP P. WEIDNER
Attorney for Petitioner
George H. Lustig

Nos. 77-405 and 77-417

In the Supreme Court of the United States

OCTOBER TERM, 1977

GEORGE H. LUSTIG, PETITIONER

v.

UNITED STATES OF AMERICA

GEORGE H. LUSTIG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,
BENJAMIN R. CIVILETTI,
Assistant Attorney General,
JEROME M. FEIT,
JOSEPH S. DAVIES, JR.,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-405

GEORGE H. LUSTIG, PETITIONER

v.

UNITED STATES OF AMERICA

No. 77-417

GEORGE H. LUSTIG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in No. 77-405 (Pet. App. 36-83) is reported at 555 F. 2d 737. The opinion of the court of appeals in No. 77-417 (Pet. App. 21-25) is reported at 555 F. 2d 751.

JURISDICTION

The judgments of the court of appeals were entered on June 15, 1977, and petitions for rehearing were denied on August 12, 1977. The petition for a writ of certiorari in No. 77–405 was filed on September 14, 1977. The petition in No. 77–417, a civil case, was filed on September 16, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

NO. 77–405

1. Whether the district court violated petitioner's marital privilege by admitting the testimony of a woman whom petitioner contended was his common-law wife.

2. Whether the district court committed reversible error in instructing the jury that, once a conspiracy is shown to have existed, "slight evidence" is sufficient to show that a particular defendant was a participant in the conspiracy.

3. Whether petitioner, who retained counsel only four days before trial, was entitled to a continuance to allow counsel additional time to prepare for trial.

4. Whether evidence discovered during an inventory search of petitioner's vehicle should have been suppressed.

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[1] Rule 22(2) provides that in cases tried in Alaska the petition shall be deemed timely if *mailed* within 30 days of the judgment of the court of appeals. The petition in No. 77–405 was mailed on September 12, a Monday, and therefore is timely.

5. Whether the limitation on the questioning of two witnesses violated the Confrontation Clause of the Sixth Amendment.

6. Whether the district court should have polled the jurors on every count on which petitioner was found guilty.

7. Whether the district court properly excused a juror who said he possessed information that led him to believe petitioner was guilty.

NO. 77–417

8. Whether the district court had the authority to order the sentence on which petitioner's probation had been revoked to run consecutively to the sentence for his intervening conviction.

9. Whether petitioner could defend a probation revocation proceeding by arguing that the guilty plea on which his probation was based was invalid or by challenging the manner in which he was being credited with time spent in prison.

10. Whether a conviction for an offense committed while on probation is a sufficient reason to revoke probation.

STATEMENT

NO. 77–405

Following a jury trial in the United States District Court for the District of Alaska, petitioner was convicted of conspiracy to distribute cocaine, possession of 55 grams and 317 milligrams of cocaine, and distribution of 25 grams of cocaine, in violation of 21

U.S.C. 841(a)(1) and 846. He was sentenced to three concurrent terms of nine years' imprisonment and to a concurrent term of one year's imprisonment on one of the possession counts. These sentences are to be followed by concurrent terms of three years' special parole.[3] The court of appeals affirmed.

1. On February 27, 1976, undercover officer Bernard Lau, posing as a drug dealer from Seattle, was introduced to Gregory Pederson in Anchorage, Alaska, by Mike Tarnef, an informant (Tr. 251, 1567). After making a telephone call,[4] Pederson agreed to sell Lau one ounce of cocaine for $1,850 (Tr. 268–270, 303).

The transaction took place in front of the Royal Inn in Anchorage, Alaska. Lau drove there at Pederson's direction to meet Pederson's source, whom Pederson identified as "George Lustig" (Tr. 254, 305, 1534–1535, 1545, 1547, 1801–1802). Lau and Pederson met with petitioner.[5] Pederson obtained a package

[3] Gregory D. Pederson and Cheryl Rae Smith (also known as Sherri L. Pederson) were tried with petitioner. Pederson was convicted on two counts of distribution of cocaine and one count of conspiracy to distribute cocaine. He was sentenced to concurrent terms of seven years' imprisonment. Smith was convicted of distribution of cocaine and of conspiracy to distribute cocaine; she was sentenced to two years' imprisonment. The court of appeals affirmed Pederson's conviction. His petition for a writ of certiorari (No. 77-5118) was denied on October 31, 1977. Smith's appeal is pending in the court of appeals (No. 76-2725).

[4] Telephone toll records established that approximately 15 calls were made from Pederson's residence to petitioner's phone between January 18 and March 3, 1976 (Tr. 1197–1199).

[5] Lau (Tr. 646–649), two other officers (Tr. 646–649, 1046–1047), and Tarnef (Tr. 1571–1572) positively identified petitioner as the third person present at this meeting.

from petitioner and gave it to Lau; the package contained cocaine (Tr. 275, 309–310). Pederson told Lau that his source could supply heroin as well as cocaine (Tr. 303, 313, 1594).

On March 4, 1976, Officer Lau arranged to purchase another package of cocaine from Pederson and his wife, Cheryl Smith. Lau gave Pederson and Smith the full purchase price of $2,750, in addition to $300 that Pederson said he owed his "main man" (Tr. 317–319). While under aerial surveillance by law enforcement agents, Pederson and Smith drove to a spot near petitioner's house, where they were met by another car. The second car returned to petitioner's residence. Pederson and Smith returned to Anchorage, where they delivered the cocaine to Officer Lau (Tr. 349–350, 1243–1274, 1287–1290, 1906, 1908).

Both deliveries of cocaine were packaged in "seal-a-meal" bags, a unique means of handling cocaine (Tr. 278, 291, 1043–1044). Petitioner was arrested on March 11, 1977, in a truck that contained a "seal-a-meal" machine, a set of scales, a "seal-a-meal" bag containing 55 grams of 50 percent cocaine, an unused "seal-a-meal" bag, and a vial of 317 milligrams of pure cocaine (Tr. 767–769, 777–781, 974–977).

Petitioner admitted possessing the cocaine discovered at the time of his arrest but claimed that the drug was for his personal use (Tr. 1604, 1610). But Callie Newton, who had lived with petitioner for many years, testified that on numerous occasions petitioner had sold substantial quantities of cocaine to

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several people—including Pederson—and that he once told Pederson that he wished to sell to only a few people in order to guard against detection (Tr. 1951, 1954–1955). Newton saw petitioner use a scale and sealing machine in providing cocaine to Pederson; Newton also testified that Pederson and petitioner had a verbal agreement to distribute cocaine (Tr. 1951–1952, 1955).

NO. 77–417

On May 3, 1974, petitioner pleaded guilty in the United States District Court for the District of Alaska to smuggling marijuana, in violation of 18 U.S.C. 545. He was fined $10,000 and sentenced to five years' imprisonment. The prison term was suspended, and petitioner was placed on probation. On September 10, 1976, the district court revoked petitioner's probation on the basis of his intervening convictions in the cocaine case and his admission at that trial that he possessed cocaine. It ordered petitioner to serve the five years' imprisonment imposed on the revocation consecutively to the nine years' imprisonment he had received for the cocaine violations. The court of appeals affirmed.

ARGUMENT

NO. 77–405

1. Petitioner contends that the district court erred in admitting the testimony of Callie Newton, with whom he had lived for seven years. The argument that Newton's testimony violated the interspousal privilege was thoroughly considered and properly re-

jected by the court of appeals (Pet. No. 77–405 App. 68–73). We rely on its opinion. Newton and petitioner were not at the time of trial (and never had been) validly married under Alaska law, they were no longer living together, and Newton's testimony revealed neither marital confidences nor spousal communications. She testified only concerning her observations of petitioner's engaging in drug transactions with third parties.

2. Petitioner argues that the district court erred in instructing the jury that, once a conspiracy is shown to have existed, "slight evidence" is sufficient to show that a particular defendant participated in it. We agree with petitioner that the instruction was erroneous.[5] But the same claim was raised by Pederson, and this Court denied his petition for a writ of certiorari on October 31, 1977 (No. 77–5118). There is no greater reason to grant review here than in Pederson's case.[6]

---

[5] The Fifth Circuit has held that the charge should not be given to the jury because it may lead the jury to convict even though it has a reasonable doubt. See, *e.g.*, *United States* v. *Partin*, 552 F. 2d 621 (C.A. 5), certiorari denied, October 17, 1977 (No. 77–34); *United States* v. *Hall*, 525 F. 2d 1254, 1256 (C.A. 5). The "slight evidence" test should be used only as an aid in judicial evaluation of the sufficiency of the evidence under the standard of *Glasser* v. *United States*, 315 U.S. 60, 80. See, *e.g.*, *United States* v. *Addonizio*, 449 F. 2d 100, 102 (C.A. 3), certiorari denied *sub nom. Gordon* v. *United States*, 404 U.S. 1058; *Langel* v. *United States*, 451 F. 2d 957, 961–962 (C.A. 8); *United States* v. *Marrapese*, 486 F. 2d 918 (C.A. 2), certiorari denied, 415 U.S. 994.

[6] We are providing petitioner with a copy of our brief in opposition in No. 77–5118. Because petitioner's nine-year term of im-

3. Petitioner obtained new counsel four days prior to his scheduled trial date, although the district court had urged petitioner a month earlier to complete any

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prisonment on his conspiracy conviction runs concurrently with nine-year terms of imprisonment on two of the substantive counts, this Court need not consider petitioner's challenge to the conspiracy instruction. See *Andresen* v. *Maryland*, 427 U.S. 463, 469 n. 4; *Barnes* v. *United States*, 412 U.S. 837, 848 n. 16. Petitioner's assertion (Pet. 16 n. 20) that the error in the charge on conspiracy "permeated all of the verdicts" is unsupported. The district court unequivocally instructed the jury that each offense charged should be considered separately (R. 549), and at trial petitioner expressly admitted possessing the cocaine found when he was arrested (Tr. 1604, 1610).

Moreover, the error in the instructions was harmless. The evidence of petitioner's guilt for distributing 25 grams of cocaine to Pederson on February 27, 1976 (Count I), and his possession of 55 grams of cocaine on March 10, 1976, when he was arrested, is clear. Petitioner admitted possessing the cocaine discovered at the time of his arrest (Tr. 1604, 1610). There is compelling evidence that petitioner distributed cocaine to Lau and Pederson on February 27, 1976. Four witnesses identified petitioner as the person who delivered the package of drugs to Lau (Tr. 269–273, 646–649, 1571–1572, 1046–1047). Finally, the evidence that petitioner was engaged in a conspiracy was overwhelming. The drugs distributed by Pederson were packaged in an unusual manner by a "seal-a-meal" machine; one such machine was recovered from petitioner at the time of his arrest. Pederson and petitioner were in frequent telephone contact. Callie Newton testified that she had seen Pederson purchase cocaine from petitioner on several other occasions. Although the erroneous "slight evidence" charge would be damaging if the evidence linking a defendant to a conspiracy was arguably tenuous, in this case Pederson's and petitioner's relationship with each other was the conspiracy. Accordingly, it is inconceivable that the jury could have found that a conspiracy existed but that petitioner's connection to it was only "slight"; the instruction therefore could have had no effect on the jury's deliberations.

arrangements with an attorney in time to ensure proper representation. After obtaining new counsel petitioner moved for a continuance, and the district court denied this motion. The court of appeals fully answers petitioner's argument that the denial of a continuance was an abuse of discretion (Pet. No. 77–405 App. 57–61).

4. On March 11, 1976, petitioner was arrested near his home while driving a pick-up truck. One officer gave petitioner *Miranda* warnings; another returned to the truck "[t]o secure the items of value and to conduct an inventory for the items prior to the vehicle being impounded" (Tr. 765), in accordance with standard procedure (Tr. 825). He discovered a brown paper bag lodged between the cab seat and the passenger door (Tr. 827) in such a way that, when the door was opened, it looked as if the items were "going to fall out" (Tr. 830). The bag, which the trooper seized and immediately opened, contained a "seal-a-meal" bagging machine, later identified as the one used for packaging the cocaine sold to Lau, an unused "seal-a-meal" bag, and drug weighing scales (Tr. 766–769, 827). These items were introduced at trial.

Petitioner moved at trial to suppress the items found in the truck because the state officers had arrested him on a federal warrant. He contended that this violated Fed. R. Crim. P. 4 and 9. The district court rejected this argument. On appeal petitioner urged different grounds for suppression; he

contended that the bag had been opened without probable cause and that, although the bag had been opened at the scene of the arrest, it could not be reopened at the police station without a warrant.

Because petitioner did not make these arguments in the district court, he is precluded by Fed. R. Crim. P. 12(f) from making them now as reasons to overturn a decision against him.[7] See *United States* v. *Hicks,* 524 F. 2d 1001 (C.A. 5), certiorari denied, 424 U.S. 946; *United States* v. *Braunig,* 553 F. 2d 777, 780 (C.A. 2), certiorari denied, 431 U.S. 959 ("where a party has shifted his position on appeal and advances arguments available but not pressed below * * * waiver [under Rule 12(f)] will bar raising the issue on appeal"); *United States* v. *Fuentes,* 563 F. 2d 527, 531–533 (C.A. 2).

In any event, the search was proper under *South Dakota* v. *Opperman,* 428 U.S. 364. Alaska law authorized a routine inventory of the truck (see Pet. No. 77–405 App. 67). Petitioner seeks to distinguish *Opperman* on the ground that in the present case the bag found in the truck was reopened at the stationhouse, but the distinction will not serve; in *Opperman* itself the car was impounded near the stationhouse before being searched for inventory purposes. What is more, petitioner's privacy interest in the bag—

[7] See also Fed R. Evid. 103(a)(1), which requires an objection stating the specific ground for the exclusion of evidence. If a party asserts an improper reason, a ruling admitting evidence will not be disturbed even though an objection on another ground might have led to exclusion.

diminished considerably by its presence in the truck—was overcome by the legitimate inventory search to which it was subjected, and the second opening of the bag was not a further invasion of privacy but simply the completion of the inventory that had already begun.[8]

Petitioner's reliance on *United States* v. *Chadwick,* No. 75–1721, decided June 21, 1977, is unwarranted. The Court reaffirmed the propriety of inventory searches (slip op. 8 n. 5), pointing out that the warrant requirement is singularly inapplicable to such searches, which usually are not based on probable cause. Moreover, the search here would have been proper under settled Ninth Circuit law without regard to the inventory search justification (see, *e.g., United States* v. *Mehciz,* 437 F. 2d 145 (C.A. 9), certiorari denied, 402 U.S. 974), and any change in the law worked by *Chadwick* should not be applied to searches

[8] Petitioner contends in a supplemental memorandum that the inventory search was unauthorized by Alaska law. The state case on which petitioner relies (*Zehrung* v. *State*, 569 P. 2d 189 (Sup. Ct. Alaska)) holds, however, only that an inventory search may not be conducted "if the arrestee is not to be incarcerated" (569 P. 2d at 193). Petitioner was subjected to a full custodial arrest, however, and the inventory search therefore was authorized by Alaska law. (Petitioner's further contention (Pet. 22 n. 28) that an inventory was impermissible because petitioner's friends would have accepted custody of the truck was apparently rejected by the court of appeals and in any event states only an issue of Alaska law not requiring resolution by this Court. Moreover, we doubt that release of the truck to petitioner's friends would have been permissible, because it was subject to forfeiture. See generally *Cooper* v. *California*, 386 U.S. 58.)

conducted before that case was decided. *United States* v. *Peltier*, 422 U.S. 531.[9]

5. Petitioner argues that his right to confront his accusers was infringed by the district court's limitations on the cross-examination of Tarnef and Newton. We rely on the court of appeals' answer to this contention (Pet. No. 77–405 App. 73–78).[10]

6. Petitioner contends that the district court should have polled the jury on each count on which he was found guilty. But the court asked each juror whether the entire verdict was a true verdict, and each answered affirmatively. No more was required; the conduct of a more elaborate poll is committed to the court's discretion. See Fed. R. Crim. P. 31(d).

Petitioner's counsel filed an affidavit (R. 625) stating that a juror had told a friend (and been overheard by someone who told counsel) that the verdict

[9] Two courts of appeals have held that the principles of *Chadwick* should not be applied retroactively. See *United States* v. *Reda*, 563 F. 2d 510 (C.A. 2); *United States* v. *Montgomery*, 558 F. 2d 311 (C.A. 5), certiorari denied, October 31, 1977 (No. 77–5205).

[10] *Davis* v. *Alaska*, 415 U.S. 308, on which petitioner relies, does not support him. *Davis* involved the right of the defendant to cross-examine a critical witness on the questions whether he was biased because of his vulnerable status as a probationer and his concern that he might be a suspect in the crime that defendant was charged with committing. Here, by contrast, petitioner was allowed substantial latitude to inquire into bias, and the district court cut off the questioning only when it became a repetitious inquiry into matters that were clearly collateral. Moreoever, the court allowed counsel to bring out that Newton had a civil suit pending against petitioner (Tr. 1988) and cut off questioning only when counsel sought to examine the minute details of that suit (Tr. 1988–1989).

was not unanimous (Pet. No. 77–405 App. 67). But the affidavit does not identify either the juror in question or the person who overheard this conversation, and the record of petitioner's trial shows that each juror endorsed the verdict in open court. Petitioner therefore has established no reason to depart from the principle that where no dissent or uncertainty is demonstrated in court, testimony will not be received from jurors or others regarding the verdict. *Stein* v. *New York*, 346 U.S. 156, 178; *Hyde* v. *United States*, 225 U.S. 347, 382–384; *United States* v. *Stacey*, 475 F.2d 1119, 1121 (C.A. 9).

7. Petitioner argues that the district court denied him the right to be present at all critical stages of the proceedings against him when, on the second day of trial and without the presence of counsel, the court examined in its chambers a juror who had stated he possessed information that made him believe that petitioner and his co-defendants were guilty. The court promptly excused the juror from further duty. As the court of appeals correctly held (Pet. No. 77–405 App. 62–65), the court's action conformed to procedures sanctioned by other courts of appeals and, because the juror was excused, could not possibly have prejudiced petitioner.

NO. 77–417

8. Petitioner argues that he was twice punished for the same crime because the district court, on revoking the probation petitioner was serving for his mari-

juana conviction, ordered him to serve the reimposed sentence consecutively to the sentence for the cocaine convictions. But *Zerbst* v. *Kidwell*, 304 U.S. 359, holds that consecutive service is permissible; service of the sentence for an intervening offense committed by a parolee tolls the running of the remainder of the earlier sentence from which the parole has been granted. See also *Moody* v. *Daggett*, 429 U.S. 78, 85. There is no reason to apply a different rule to probation. See *United States* v. *Tacoma*, 199 F. 2d 482 (C.A. 2); cf. *United States* v. *Bartholdi*, 453 F. 2d 1225, 1226 (C.A. 9). The revocation simply reinstates the original sentence for the marijuana conviction; it is not an additional penalty for the cocaine convictions.

9. Petitioner urges that he is entitled to credit against his five-year sentence for time spent awaiting his probation revocation hearing (Pet. No. 77–417, pp. 11–13) and that the 1974 guilty plea, on which his probation was based, was invalid (*id.* at 16–17). Petitioner did not argue in the court of appeals that 18 U.S.C. 3568 was being violated because he was not being credited with time spent in prison, and he may not raise the question here for the first time. In any event, a probation revocation proceeding is not the proper forum for either argument. Petitioner's contention that he is not receiving credit for time spent in jail should be brought in a *habeas corpus* proceeding under 28 U.S.C. 2241, and his contention that his guilty plea is invalid should be made in an applica-

tion to vacate his conviction under 28 U.S.C. 2255. A probation revocation hearing does not offer an opportunity to attack the underlying judgment. *United States* v. *Francischine*, 512 F. 2d 827 (C.A. 5).

10. Petitioner finally argues that his probation could not be revoked solely on the basis of his cocaine convictions. The rule is settled to the contrary. An intervening conviction affords sufficient proof for revocation. See, *e.g.*, *United States* v. *Miller*, 514 F. 2d 41 (C.A. 9). Cf. *Moody* v. *Daggett*, *supra*; *Gagnon* v. *Scarpelli*, 411 U.S. 778. Moreover, as the court of appeals observed (Pet. No. 77–417 App. 24), petitioner admitted at the cocaine trial that he possessed the cocaine found on him at the time of his arrest; this admission was introduced at the probation revocation hearing and afforded an independent basis for revoking his probation.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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NOS. 77-405 Cr. AND 77-417 Cr.

In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-405 Cr.

GEORGE H. LUSTIG, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

NO. 77-417 Cr.

GEORGE H. LUSTIG, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

I. JURISDICTION

No. 77-417 Cr., is a quasi-criminal case requesting review of a probation revocation and sentence.

II. QUESTIONS PRESENTED FOR REVIEW

NO. 77-405 Cr.

Respondent's Issue No. 4 incorrectly infers the "seal-a-meal" machine was discovered during an inventory

search of petitioner's vehicle, as opposed to a later warrantless search of an opaque parcel at police headquarters. (Tr. 765, 768) (App. D. Pet. No. 77-405 Cr., p. 27-28; App. E., Pet. No. 77-405 Cr., p. 45-61)

Respondent's Issue No. 7 incorrectly infers the juror excused ". . . said he possessed information that led him to believe petitioner was guilty." The trial judge simply made unsworn conclusions that the juror would be unfair to an unspecified defendant. (Tr. 321-330) (App. E, Pet. No. 77-405 Cr., p. 61-62).

NO. 77-417 Cr.

Respondent's Issue No. 8 ignores the distinction between increasing the severity of a sentence at a revocation by specifying consecutive time, and delaying the initiation of revocation proceedings until after service of an intervening sentence.

III. STATEMENT OF THE CASE[1]

NO. 77-405

The petitioner was convicted in Count V of possessing 317 milligrams of cocaine in violation of 21 U.S.C. 844(a), not 21 U.S.C. 841(a) (1). Count IV charged possession of 55 grams in violation of 21 U.S.C. 841 (a) (1). (R.888) (App. B, Pet. No. 77-405 Cr., p. 85-87).[2]

[1] Most of the critical portions of the transcript and record are set out in App. D and E to Petition No. 77-405 Cr., filed under separate cover September, 1977.

[2] This refutes respondent's contention that petitioner's admission of possession for personal use invokes the "concurrent sentence doctrine", and the "harmless error" rule.

Only Tarnef, who was protected from confrontation on bias, indicated Pederson used Lustig's last name. (Tr. 1514-1518, 1791, 1802, 1805). Lau never ". . . met with petitioner". (Resp. Op., p. 4).[3]

The truck being driven by petitioner did not contain 55 grams of cocaine in a "seal-a-meal" bag, or 217 milligrams of cocaine in a vial. Those were discovered when petitioner was in transport to Anchorage. (Tr. 774-783).[4]

Petitioner contended the truck was used by five other persons on his homestead, and the paraphernalia found therein belonged to one of them. (Tr. 1605-1671).

Callie Newton Lustig never testified that ". . . Pederson and petitioner had a verbal agreement to distribute cocaine." (Resp. Op., p. 6; Tr. 1951-1955, 1997).

[3] The officers observed Pederson meet a person resembling Mr. Lustig in a truck across an intersection from where Lau and Tarnef waited. Lt. Needham, second in command, and nearest the suspect meeting Pederson, testified he did not resemble petitioner. (Tr. 1419-1421, 1432). The "I.D.'s" of the other officers were made at a distance, under poor lighting conditions, through several windshields, and were tainted by a suggestive photo lineup with names attached to the photographs. (Tr. 272, 377, 1166, 1532, 1535). No one directly observed any distribution by Lustig, and Pederson testified Lustig was not involved. (Tr. 1575, 1891).

[4] Thus, the troopers making the arrest were bound by state law to release the vehicle to the petitioner's friends, negating an inventory search exception.

IV. ARGUMENT

NO. 77-405 Cr.

A. THE PETITIONER'S VALID COMMON LAW MARRIAGE WAS DESTROYED BY FAILURE TO RESPECT HIS MARITAL PRIVILEGE; HIS WIFE TESTIFIED TO MARITAL COMMUNICATIONS.

Respondent, and the Court of Appeals, assert the Newton-Lustig marriage was invalid under Alaska law, citing AS 25.05.011, 25.05.261, and 25.05.311, despite the fact that the marriage was valid under common law principles. (Tr. 1964; App. D, Pet. No. 77-405 Cr., p. 1). See *U.S. v. Lustig*, 555 F.2d 737, n. 11 (9th Cir., 1977). The Alaska Statutes referred to are essentially "property" statutes, limited by the Alaska Supreme Court on an equal protection analysis.[5]

Two children were born of the marriage, and a final decree has not yet been granted in Callie's civil suit, filed two days prior to trial, seeking dissolution of the marriage and assets and child custody; negotiations for a reconciliation are ongoing in the pretrial stages. (Tr. 1926, 1927, 1932, 1933, 1962-1965).

Callie testified as to marital communications relating to family finances imparted to her by Mr. Lustig while in the hospital, (Tr. 1950, 1955, 1961, 1967, 1969, 1970, 1971, 1994, 1996, 1997, 2004, 2014), and as to family dissension

[5] See concurring opion of Justice Erwin in *Burgess Construction Co. v. Lindley*, 504 P.2d 1023, 1026 (Alaska 1972). See also *Hager v. Hager*, 558 P.2d 919 (Alaska 1976) (AS 04.55.210 (6)) (statutory division of marital property as applied to common-law marriage), AS 11.35.010 (obligation of child support), AS 11.35.100 (both parents have parental rights to illegitimate children), AS 13.11.045 (inheritance through mother and father if acknowledged), AS 20.15.040 (consent of both parents for adoption).

over "drug dealing". (Tr. 1957, 1966). These communications occured prior to her leaving him. (Tr. 1965).

B. THE ERRONEOUS CONSPIRACY INSTRUCTION PREJUDICED THE PETITIONER AS TO ALL THE FELONY COUNTS OF THE INDICTMENT

While the "concurrent sentence" doctrine and the "harmless error rule" might have led the Court to deny certiorari for the co-defendant Pederson[6], the erroneous conspiracy instruction contributed to the conviction of Mr. Lustig on the two substantive counts of possession of cocaine with intent to distribute and distribution of cocaine in violation of 21 U.S.C. 841 (a) (1).[7]

[6] The "concurrent sentence" doctrine is of doubtful validity. See *Benton v. Maryland*, 395 U.S. 784, 23 L.Ed.2d 707, 89 S. Ct. 2056 (1969), at 395 U.S. 791: "The concurrent sentence rule *may* have some continuing validity as a rule of judicial convenience." (E.A.). See also *U.S. v. Alexander*, 471 F.2d 923, 933, n. 17 (D.C. Cir. 1971), *cert. denied* 409 U.S. 1044 (1972), for the observation ". . . *the validity of the concurrent sentence doctrine is rapidly waning.*" (E.A.). Further, the concurrent sentence doctrine is merely a rule of discretion, and not a bar to review. See *U.S. v. Spear*, 449 F.2d 946, 948-949 (D.C. Cir. 1971). The recent decision in *U.S. v. Dunn*, F.2d , (Slip Op. 2674 at 2683) (C.A. 9th No. 76-2172; decided Nov. 11, 1977), indicates another panel has strongly criticized the "slight evidence" instruction due to its nullification of the concept of proof beyond a reasonable doubt, such that there is conflict within the Ninth Circuit, and this Court should exercise its discretion to clarify the issue.

> ". . .[C]onstrued to imply that participation in a criminal conspiracy may be proved by evidence that would be inadequate to prove the commission of some other criminal act, *the so-called slight evidence rule would vitiate the government's ever-present burden of proof. . . beyond a reasonable doubt*, the presumption of innocence, the rule that all doubts must be resolved, and equally plausible inferences drawn, in favor of the defendants and other traditional foundations of our nation's system of criminal justice. *U.S. v. Dun, supra* at 2683 (E.A.) (fn. omitted).

The jury was instructed in Instruction No. 20 that a conspirator is responsible for the acts of co-conspirators (R. 532), and was instructed orally that before determining whether statements of a co-conspirator could be used against the petitioner, they must determine that a conspiracy existed involving the petitioner. (Tr. 298).

The erroneous conspiracy charge "permeated all the verdicts" by allowing the jury to consider inadmissable statements and acts of purported co-conspirators on Mr. Lustig's intent in possessing 55 grams of cocaine in Count IV, and whether Mr. Lustig personally distributed cocaine to Mr. Pederson, or aided in said distribution, in Count I.[8]

[7] Pederson directly admitted the two counts of distribution. (Tr. 1821 - 1863). Any evidence of distribution by Lustig to Pederson was circumstantial and based on conflicting identifications. Pederson specifically denied the distribution was made by Lustig. (Tr. 1891).

While petitioner did admit possessing the cocaine discovered at the arrest, his defense was that the cocaine was for his personal use, so as to constitute a mere violation of 21 U.S.C. 844(a).

As to the "seal-a-meal" machine discovered in the truck at the arrest, and the phone calls to petitioner's residence, there was evidence that five other persons were using the truck and living on the petitioner's homestead. The petitioner testified that while one of said persons was dealing, he was merely a knowing spectator, and refused to participate in said activity, or enter any "conspiracy" due to fear of having his probation revoked. (Tr. 1591-1671). Thus, it is highly likely the jury found the conspiracy to exist between Pederson, his wife, Cheryl Rae Smith, a/k/a Sherri L. Pederson, and other persons, with the "slight evidence" instruction used to convict petitioner of conspiracy on less than proof beyond a reasonable doubt, and to impute to petitioner the damaging statements and acts of the co-conspirators as to the other substantive counts against him.

C. THE SEARCH OF THE OPAQUE PARCEL AT HEADQUARTERS VIOLATED THE FOURTH AMENDMENT; TIMELY AND SPECIFIC OBJECTIONS AND MOTIONS TO SUPPRESS WERE MADE.

The "seal-a-meal" bagging machine was not discovered until the parcel illegally seized from the petitioner's truck was searched later at police headquarters. (Tr. 767-769). Timely and specific motions to suppress and objections were made.[9]

[8] Respondent's contention there was "compelling evidence" of distribution by Lustig and "overwhelming" evidence of conspiracy, is false. Contrary to Respondent's statement that "four witnesses identified petitioner as the person who delivered the package of drugs to Lau", (Resp. Op., n. 6), there was no testimony that Lau and petitioner met directly. Thus, Pederson's purported use of Lustig's last name during the active phase of the conspiracy was a critical evidentiary issue effected by the erroneous conspiracy charge, as were the other purported statements by Pederson which tended to connect Lustig to the distribution. ("main man" in Wasilla, "owing $$ to main man", etc.). Unlike Pederson, there was no direct evidence of distribution by Lustig and no direct evidence of his intent to distribute. Callie Newton Lustig's testimony as to purported acts of distribution and/or conspiracy by the petitioner, went to acts and time periods not directly alleged in the Indictment.

[9] Respondent argues incorrectly at page 10 of its brief that "Because petitioner did not make these arguments in the district court, he is precluded by Fed. R. Crim. P. 12(f) from making them now. . .". In fact, motions and requests for evidentiary hearings were made on the grounds that the searches of the petitioner's truck and the contents were not justified as valid inventory or automobile searchs, or searchs incident to arrest under federal and state law. (App. E, Pet. No. 77-405 Cr., p. 45-52; R. 43, 210, 212, 218, 263). During trial objections and written suppression motions, and offers of proof were also made on the grounds now urged by Petitioner (App. E, Pet. No. 77-405 Cr., p. 27, 53, 59; R. 371, 383-412; Tr. 743-753, 765). See Fed. R. Evid. 103 (a) (1).

Respondent's argument disregards the fact that under *U.S. v. Chadwick*, 97 S.Ct. 2476 (1977), *South Dakota v. Opperman*, 428 U.S. 364 (1976), and the holding of the Court of Appeals herein, it is essential any "inventory search" be valid and/or mandatory under Alaska law.[10]

Since the truck should have been released, there was no necessity for an inventory search and the warrantless seizure of the opaque parcel and ensuing search at police headquarters was unjustified under either *South Dakota v. Opperman, supra,* or *U.S. v. Chadwick, supra.*

[10] Since the officers making the arrest, searches and seizures were Alaska Troopers, Alaska law governs. *Elkins v. U.S.*, 364 U.S. 206, 80 S.Ct. 1437 (1960). *Zehrung v. Alaska*, 569 P.2d 189 (Alaska 1977), is relevant since the case indicates the Alaska Supreme Court has adopted the "necessity" doctrine as to an inventory search of a persons body with the implication that the "necessity" doctrine will be applied to automobiles. See also *State v. Goodrich*, 21 Cr.L. Rptr. 1977 (Minn. 7/15/77) (necessity standard for automobile inventory search). Respondent's contention the truck could not be released to petitioner's friends as mandated under 13 AAC 2.350, 13 AAC 2.375, and *Zehrung, supra,* because "subject to forfeiture", misconstrues the facts, since any cocaine discovered was found on the person of the petitioner during transport, after the invalid seizure of the truck had occured. Note further, Alaska has no forfeiture provisions for vehicles used to transport controlled substances, and see *U.S. v. Rickman*, 523 F.2d 323, 328 (9th Cir. 1975) and *U.S. v. McCormick*, 502 F.2d 281 (9th Cir. 1974) as to the necessity of exigent circumstances and probable case for a warrantless "forfeiture seizure".

D. THE ARBITRARY DENIAL OF THE RIGHT TO BE PRESENT, OR A RECORD, AT THE COMMUNICATION WITH AND EXCUSAL OF A JUROR, PREJUDICED THE PETITIONER'S RIGHT TO A JURY TRIAL, AND WAS A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

Respondent incorrectly argues the excused juror stated he ". . . possessed information that made him believe the petitioner was guilty. . .". (Resp. Op., p. 13).[11]

The court's action did not ". . . [conform] to procedures sanctioned by other courts of appeal. . ." (Resp. Op., p. 13), in that no cases have affirmed such action in the absence of an emergency. Thus, there was prejudice to petitioner's right to a particular jury and prejudice by seating the alternate, who was not approved by the petitioner. (Tr. 130; Petitioner Lustig's Reply Brief in C.A. 9th No. 76-2661 at p. 4-6).

[11] This assumption was one made by the Ninth Circuit, and apparently adopted by the government. It was apparently based on unsworn conclusions made by the trial judge. (Tr. 321-330). The Petitioner consistently requested a sworn record to make an independent assessment of any purported prejudice, so as to argue for the right to be tried by a particular juror. cf. *U.S. v. Jorn*, 91 S.Ct. 547 (1971); *Wade v. Hunter*, 363 U.S. 684, (As to ". . . defendant's valued right to have his trial completed by a particular tribunal. . ."). See also. *U.S. v. Dinitz*, 96 S.Ct. 1075 (1976), as to the prohibition against terminating a defendant's right to trial before a particular jury.

> "Even when judicial or prosecutorial error prejudices the defendant's prospect for securing an acquittal, *he may, nonetheless, desire 'to go the first jury, and, perhaps, end the dispute then and there with an acquittal.' " Dinitz, supra,* at 96 S.Ct. 1080 (E.A.).

E. THE PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL OF CHOICE THROUGH NO FAULT OF HIS OWN

Respondent ignores the prejudice to Mr. Lustig's right to counsel, to call witnesses. to cross-examine and confront accusers, and to prepare a defense, occasioned by the notoriety of the case, arbitrary freezing of his assets, the substandard conditions in which he was held, and the arbitrary refusal to grant a reasonable continuance, despite his inability to obtain counsel of choice until four days prior to trial. (See App. D, Pet. No. 77-405 Cr., p. 1-26; App. E, Pet. No. 77-405 Cr., p. 39-44).

F. THE RESENTENCING OF PETITIONER TO CONSECUTIVE TIME AT A PROBATION REVOCATION VIOLATED DOUBLE JEOPARDY

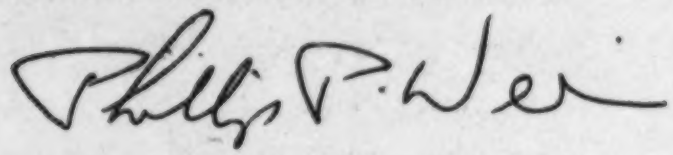
Respondent incorrectly cites *Zerbst v. Kidwell,* 304 U.S. 359 (1938), *Moody v. Daggett,* 429 U.S. 78, 85 (1976), and *U.S. v. Bartholdi,* 453 F.2d 1225, 1226 (9th Cir. 1972), which indicate service of a parole warrant may be delayed until completion of an intervening sentence, not that parole may be revoked with the specification of a consecutive sentence.[12]

Since here the petition to revoke probation was served, a revocation hearing was held, and probation was revoked, the re-sentencing of Mr. Lustig to consecutive service of the original sentence violated the double jeopardy clause, 18 U.S.C. 3651, 18 U.S.C. 3653, and 18 U.S.C. 3658.[13]

V. CONCLUSION

The petitions for writs of certiorari should be granted.

Respectfully submitted,



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January 17, 1978

[12] In *U. S. v. Tacoma,* 199 F.2d 488, 482 (2nd Cir. 1952), there was a contemperaneous sentencing for an intervening offense and a probation revocation; since the aggregate result was clearly within the jurisdiction of the sentencing judge, the court affirmed.

[13] The reference to 18 U.S.C. 3658, demonstrates the validity of petitioner's argument that once a warrant on a petition to revoke probation is served, a probationer cannot be "resentenced" to consecutive time to an intervening conviction, and yet still be held pending an appeal from said conviction, on the probation revocation judgment. This specific argument was made in oral argument before the Ninth Circuit and in the Petition for Rehearing En Banc.

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that pursuant to Rule 24(4), Rule 33 (1), Rule 33 (2) (a), and Rule 33 (3) (b), of the Supreme Court Rules of Appellate Procedure, that I am a member of the Bar of the U.S. Supreme Court in good standing, and that three copies of the foregoing Reply Brief of Petitioner in Support of Petitions For Writs of Certiorari to the U.S. Court of Appeals for the Ninth Circuit were served upon counsel for the Respondent, the Solicitor General of the United States, and counsel for both co-defendants below, by depositing the same in the United States mail at Anchorage, Alaska, postage pre-paid, addressed to:

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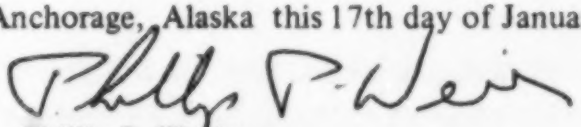
DATED at Anchorage, Alaska this 17th day of January, 1978



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